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FOREWORD

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CONTENTS

	Page
The Status of Consuls—Henry S. Boutell and James W. Berry.....	1
Procedure by Default in Supreme Court Against Defendant States—Raleigh C. Minor.....	8
The Patent System and Its Relation to the Evo- lution of the Industrial Arts—Thomas Ewing.	18
Editorial	23
Notes	27
Recent Cases.....	38
Book Reviews.....	46

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No. 1

THE STATUS OF CONSULS.

In recent years on account of the European War and complications arising from time to time in this hemisphere, questions relating to the status of Consuls Missi, their rights and the corresponding remedies for infraction of those rights have assumed peculiar importance no less to the specialist in International Law than to the well informed layman, the general practitioner and to the conscientious law student who may wish acquaintance with problems somewhat outside of a curriculum and the limits of a Bar Examination.

To determine the status, rights and remedies for the infractions of the rights of Consuls, our sources are the Treaties and Conventions between the State sending and the State receiving a Consul, and in the absence of such stipulations we must then resort to the established principles of International Law. The rule of the United States Supreme Court was expressed in the case of the "Paquette Habana," 1899, by Mr. Justice Gray at page 699 of 175 U. S., page 328-9, of 44 Law Ed., as follows:

"International Law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who, by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is. (Citing *Hilton v. Guiot*, 159 U. S. 113 et seq.)

According to such evidence, therefore, do Consuls in Christian countries possess such diplomatic and representative character as to be reckoned Public Ministers? By the weight of the generally accepted opinion of the authorities Consuls in Christian countries to-day are not clothed with the Diplomatic or Representative power fully and are not, in the sense in which the term is used in the Statute of 7th Anne cap 12, and in the Constitution and Revised Statutes of the United States, Public Ministers. Consequently they are not entitled to claim inviolability of person and the other privileges and immunities which are the acknowl-

edged rights of a Public Minister. This view is abundantly sustained by numerous authorities.¹

A minority, numbering however, some writers of acknowledged standing, notably of the French School, hold Consuls to be Public Ministers.²

Conceding that Consuls Missi are not Public Ministers, it does not follow that their status is the same as that of private aliens who voluntarily place themselves within the jurisdiction of a foreign State. Writers of authority, and the practice of States unite in holding that Consuls Missi do possess a public character, due to their commission from the Executive Power in their State, and that they are officially recognized as functionaries of a foreign State, due to the mere act of granting to them an exequatur by the State which receives them and within which they perform their offices. The acknowledgment of such public character peculiar to a foreign official was thus stated by Daniel Webster as Secretary of State to Don A. Calderon de la Barce, Spanish Minister at Washington, regarding violence shown Spanish subjects in New Orleans in 1850 :

"The undersigned sincerely regrets that any misapprehension should have grown up out of any conversation between Mr. Calderon and officers of the Government on this unfortunate and unpleasant affair, but, while this Government has manifested a willingness and determination to perform every duty which one friendly nation has a right to expect from another in cases of this kind, it supposes that the rights of the Spanish Consul, a public officer, residing here under the protection of the United States Government, are quite different from those of the Spanish subjects who have come into the country to mingle with its own citizens, and here to pursue their private business and objects. The former may claim special indemnity, the latter are entitled to such protection as is afforded to our own citizens."³

¹Bouvier, 648, Rawle's 3d Revision.

9 R. C. L., 156 et seq.

Barbuit's Case in Chancery, 1725, Cases Temp. Talbot, 281.

Clarke v. Cretico, I, Taunton's Reports, 106.

Vattel, Law of Nations, II, Chap. 2, Sec. 34.

Bluntschli, Droit International Codifié, p. 160, IV, Art. 244, 267.

Jefferson, Sec. fr. For. Affs., to Newton, Sept. 8, 1791, Ms. Am. Let., 283.

Sir Travers Twiss, The Law of Nations Considered as Independent Political Communities.

Geffcken's Heffter, traduit par Bergson, p. 565, note to par. 248.

Opinion of Mr. Cushing, Atty.-Gen., to Mr. Marcy, Sec. State, Nov. 4, 1854.

Opinion of William Bradford, Atty.-Gen., to Sec. of State, 1 Opinion Attys.-Gen., p. 19.

Taylor's International Law, p. 355, Sec. 325.

²Le Baron Ferdinand de Cussy in *Règlements Consulaires*.

Bluntschli in *Droit International Codifié*, Art. 249.

M. Ed Engelhardt in *de la Condition Juridique des Consuls* (*Revue de Droit International*).

Johann Jacob Moser, *Versuch des neusten europäischen Volkerrechts in Friedens und Kriegszeiten*.

³Webster's Works, vol. 6, pp. 507-12.

Hall, the eminent English authority, states in his *Treatise on International Law*, 4th Ed. 1895 p. 331 :

"Thus he (the Consul) is not internationally a representative of his State, though he possesses a public official character, which the government of the country in which he resides recognizes by sanctioning his stay upon its territory for the purpose of performing his duties."

The unquestioned public character of a Consul, even though he may not possess the privileges and immunities of a Public Minister, is further apparent from the following classification given by Phillimore in his *Commentaries upon International Law*, Vol 1 P 10, art 13 :

"First, Sovereigns.

Second, Ambassadors.

Also another class of public officers who are not clothed, accurately speaking with a representative character, but who are entitled to a *quasi* diplomatic position, namely :

Third, Consuls."

Having seen, therefore, that the status of Consuls on the one hand is below that of Public Ministers and Ambassadors, and above that of their countrymen within the same territory who are private aliens, it is in order to inquire what rights and privileges such an intermediate status carries with it.

First, in the absence of special treaty stipulations, a Consul is not regarded as exempt from the civil or criminal jurisdiction of the locality where he performs his duties.⁴

But, as provided by the United States Consular Regulations, 1896, Par. 72, a Consul is exempt from the quartering of soldiers upon him ; from service in the militia ; from jury service ; and in some cases from personal imposts ; and the Consular Archives are inviolable.

Second, A Consul is under the special protection of International Law ; a protection which he has a right to claim from his own State and from the State which has recognized him.^{4a}

This right is one of the most important which the status of Consul imports. In American State Papers, Foreign Relations, IV, 413, Mr. Adams, January 28, 1819, as Secretary of State, emphasizes this right which is defined in the following language by Vattel (*Law of Nations*, Bk. 2, Chap. 2, Sec. 34) :

"Yet, bearing his sovereign's commission, and being in this quality received by the Prince in whose dominion he resides, he (the Consul) is, in a certain

⁴ Phillimore, *Commentaries on Intl. Law*, vol. II, p. 263.

Viveash v. Becker, 3 Maule and Sel. Rep., 284.

Jefferson, Secy. of For. Aff., to Newton, Sept. 8, 1791.

^{4a} Phillimore's *Commentaries on Intl. Law*, vol. II, p. 263.

degree entitled to the protection of the law of nations. This sovereign by the very act of receiving him, tacitly engages to allow him all the liberty and safety necessary to the proper discharge of his functions, without which the admission of the consul would be nugatory and delusive."

Millard Fillmore, in a Congressional Message, dealing with the case of the Spanish Consul and other Spanish subjects in New Orleans, to which reference was previously made, used the following unequivocal terms:

"Ministers and consuls of foreign nations are the means and agents of communication between us and those nations and it is of the utmost importance that while residing in the country they should feel a perfect security so long as they faithfully discharge their respective duties and are guilty of no violation of our laws. This is admitted law of nations and no country has a deeper interest in maintaining it than the United States. Our commerce spreads over every sea and visits every clime, and our ministers and consuls are appointed to protect the interests of that commerce as well as to guard the peace of the country and maintain the honor of its flag. But how can they discharge those duties unless they be themselves protected? And if protected it must be by the laws of the country in which they reside. And what is due to our own public functionaries residing in foreign nations is exactly the measure of what is due to the functionaries of other governments residing here. As in war the bearers of flags of truce are sacred, or else wars would be interminable, so in peace ambassadors, public ministers and consuls charged with friendly national intercourse, are objects of especial respect and protection, each according to the rights belonging to his rank and station."⁵

It is unnecessary to accumulate citations on this point which is so widely acknowledged. Apart from mentioning Art IV of the Consular Regulations of 1896, Saalfeld's *Handbuch des Positiven Völkerrechts*, 1833, part I, Chap. 3, p. 119, Sec. 55, de Cussy's *Dictionnaire du Diplôme et du Consul*, note on p. 184, and Taylor's *International Public Law*, page 355, Sec. 326, we may summarize this right to special protection in the words of Phillimore:

"Consuls in Christian countries are not, legally speaking, *public ministers* of the State to which they belong, though having a *public character*; they are under a more special protection of international law than uncommissioned individuals. This protection they have a right to claim both from the State which sends, and from the State which admits them."⁶

It then becomes pertinent to inquire how a State which receives a Consul who is entitled to such special protection, even though he may be within the civil and criminal jurisdiction of the locality where he is serving, is to fulfil the acknowledged demand of International Law in his regard?

The first demand is naturally that the State receiving the Consul, is to assert the authority of its local law, where such an act may be

⁵Messages and papers of the Presidents, Vol. 5, p. 118.

⁶Commentaries on Intl. Law, Vol. II, p. 263.

necessary. It is obvious that when it becomes necessary to assert such authority, the officers charged with such a duty should in every instance bear in mind the distinguished character of the Consul as the public functionary of a friendly foreign Power, and so moderate the ordinary processes of law in his case as to avoid needlessly outraging the dignity or reputation of the officer or the dignity of the foreign Power which he represents. This principle is well illustrated by the case of Pritchard, discussed in Phillimore's Commentaries, Vol. 2, p. 266. Here, as Sir Robert Peel declared in the House of Commons, "a gross outrage accompanied with a gross indignity had been committed upon Mr. Pritchard," who it appears was a duly accredited Consul of the British Empire in Tahiti. And while it does not appear that any violence was offered in making the arrest of Mr. Pritchard, nevertheless reparation was demanded of the French Government which paid an indemnity, and made reparation to the English flag.

No better general statement of the principle could be found than that of Thomas Jefferson, who as Secretary for Foreign affairs wrote to Mr. Newton, September 8, 1791, (4 Ms S. H. Let. 283, quoted by Moore, Intl. Law Digest) :

" * * * Independently of (a special) law, consuls are to be considered as distinguished foreigners, dignified by a commission from their sovereign and specially recommended by him to the respect of the nation with whom they reside. They are subject to the laws of the land indeed precisely as other foreigners are, a convention when there is one making a part of the laws of the land; but, if at any time, their conduct should render it necessary to assert the authority of the laws over them, the rigor of those laws should be tempered by our respect for their sovereign, as far as the case will admit. This moderate and respectful treatment towards foreign consuls it is my duty to recommend and press on our citizens, because I ask it for their good, towards our own Consuls, from the people with whom they reside."

The second obligation of the State receiving a consul is to shield him from any injury or outrage arising outside of the law of the place where he may reside. Says Hall (Treatise on International Law, 4th Ed, 1895, P. 331 :

" * * * so that he (the Consul) has a sort of scintilla of an international character, sufficiently strong to render any outrage upon him in his official capacity a violation of International Law."

The United States has not only assumed the obligation thus laid upon it by International Law to protect foreign Consuls upon its territory, but it has consistently and firmly insisted that foreign States should observe this obligation in the case of American Consuls within their boundaries. For example, in Moore's International Law Digest, vol.

V. P. 70, where reference is made to the instructions of the Secretary of State to Mr. Hunter, regarding an American Consul in Brazil, Mr. Moore says:

"That the United States will insist on reparation for any personal injustice inflicted on one of its Consuls in a foreign State."

In 1900 in the case of Mr. Goldschmidt, American Consul at La Guayra, Venezuela, who had been treated with certain indignities, Mr. Hay, as Secretary of State, declared:

"The threatening of the life of a peaceable citizen, and that man a consular representative of a friendly power, cannot be treated with indifference or lightly pushed aside, and the Government of the United States will hold that of Venezuela to a strict accountability for any harm or insult that may be wantonly inflicted on Mr. Goldschmidt.

* * * * *

"It may be true that Mr. Goldschmidt was not entirely blameless or sufficiently patient under the circumstances, but even so, this fact cannot alter the circumstance that his personal liberties and rights are clearly recognized under International Law, and that any complaint that they are abridged or of insult offered should be treated on its merit. This is all that is asked, and is all that the Government of the United States expects or demands."⁷

The United States, apparently, has gone even farther than this in enforcing the rights justified by International Law, namely, in the case of Mr. Baiz who was not a Consul missi, but a consul electus, and not even an American Citizen, but a Danish subject, our consular agent at Barcelona, Venezuela. In this case, Mr. Hay declared:

"This is not the first occasion upon which Mr. Baiz has been subjected to the arbitrary action of the Venezuela local military leaders. Although he is not a citizen of the United States, this Government will protect him, while acting as its consular representative, against the arbitrary interference of Venezuelan officials. You will insist that adequate explanations and apologies be made to the consular agent, and that proper measures be taken to prevent the recurrence of such acts."⁸

The duty of protection, under International Law, is even more clear when, under circumstances warranting it, this protection is especially asked for a Consul, by that Consul's own government. When a State has laid upon it the obligation of performing a certain duty, a duty which is inherent under International Law, the obligation is the even more obvious when the attention of the State has been particularly called thereto, by a friendly power, which in taking such action, is itself, but carrying out a similar duty laid upon it, namely of protecting its own Officers in a foreign country.

⁷Hay, Sec. of State to Loomis, Min. to Venezuela, June 7th, 1900.

⁸Mr. Hay, Sec. of State to Mr. Loomis, Min. to Venezuela, Jan. 16, 1901, For. Rels., 1901, 534.

The right of the Consul to claim protection from the State receiving him and the obligation of that State to furnish such are clear. Similarly it is obvious that the Consul has the right to claim protection from his own State which sent him and that this State has an obligation to furnish him this protection. It follows necessarily that when the State receiving the Consul fails to protect him, the State that sent him, in fulfilling its duty to the Consul, may as a remedy for the violation of the Consul's rights, claim justly reparation by indemnity as well as by other means.

With regard to this reparation, the practice of States, and the opinions of authority are in accord. In the case of the Spanish Consul at New Orleans, previously cited, the view of the United States was well expressed by Mr. Webster:

" * * * The Government of the United States should provide for Mr. Laborde (the Spanish Consul) a just indemnity, and recommendation to that effect will be laid before Congress at an early period of its approaching session."⁹

Many years later, Mr. Bayard, in commenting on this case to the Chinese Minister, emphasized the fact that the "emblem of Spanish authority had suffered affront in a City of the United States;" that, "the especial immunity attaching to the Spanish consular representative had been impaired and he subjected to personal indignity;" and that the president recommended to Congress the appropriation of a special indemnity to the Consul as an official of Spain.¹⁰

The foregoing cases are sufficient to show the duty which International Law lays upon Christian nations in regard to the protection of Consuls Missi, who though not Public Ministers, yet have the character of public functionaries, and as such, while not exempt from the civil and criminal jurisdiction of the locality where their duties are to be performed, are nevertheless, entitled, first to the assertion of all the authority of the local law in their behalf, and second to protection for any injury or outrage arising outside of such local law, and third to reparation and indemnity where such protection has not been accorded.

HENRY S. BOUTELL.
JAMES W. BERRY.

⁹6 Webster's Works.

¹⁰Mr. Bayard, Sec. of State, to Mr. Chen Tsao Ju, Chinese Minister, February 18, 1886. For. Rels., 1886, 158; H. Ex. Doc., 102, 49 Cong. 1 Ses.

PROCEDURE BY DEFAULT IN SUPREME COURT AGAINST DEFENDANT STATES. *

If we would fully comprehend the difficulties inherent in the questions here to be discussed, we must in imagination throw ourselves back for a moment into the early period of our constitutional history and into its political and judicial atmosphere.

Three years have passed since 1789 when the federal convention submitted the Constitution, now duly ratified by conventions of the people in the several states. Under that Constitution the government of the United States has been organized, and the Supreme Court of the United States, by no means possessed as yet of the dignity and authority which now inform it, is sitting to adjudicate the causes which, under the Constitution and laws of the Union, may be brought before it.

Among these are "controversies between two or more States; between a State and citizens of another State. . . . and between a State, or the citizens thereof, and foreign States, citizens or subjects." And the Constitution has expressly declared that "in all cases . . . in which a State shall be a party, the Supreme Court shall have original jurisdiction."

Here we behold the elements of one of the grandest experiments ever made in the field of political science, the successful outcome of which will mark perhaps the most important revolution in the political history of the world. The States that have thus solemnly undertaken to leave all their disputes to the decision of this tribunal have been accustomed to regard themselves as sovereign States in all respects save the comparatively few wherein they have surrendered their powers to the newly organized federal government. No European nation of today could be more jealous of its sovereignty and independence than are the States just entering upon this governmental enterprise.

Will it,—can it,—succeed? Will it be possible to induce these States to yield gracefully to judgments rendered against them by this tribunal, or will they decline to obey the mandates of the court, or, worse still, resist the enforcement of its decrees? Will they deny the court's right to do more than render judgments, leaving it to the good will of defendant States whether the mandates shall be obeyed, or to the discretion of

*This article was read by the author on December 8, 1916, at a meeting of the American Society for Judicial Settlement of International Disputes, by whose permission it is here reproduced.

plaintiff States whether they shall themselves undertake to enforce them. If the decision be against the plaintiff State, will it consent to abide by the judgment of the court, or will it be likely to disregard it and seek to enforce its alleged rights *vi et armis*? By what process shall a defendant State be summoned to appear before this supreme tribunal, and, when summoned, if it refuse to appear or to recognize the jurisdiction of the court, shall its presence be compelled, or shall judgment by default be rendered against it, or shall the court decline to pronounce judgment for lack of jurisdiction? Shall the sovereignty of the State be a shield to protect it from suits prosecuted against it by individuals, or does the court's jurisdiction extend even to such cases?

These are some of the questions that present themselves to the minds of the justices of the court, the lawyers practising at its bar, and the statesmen of the country, when it is announced in 1792 that a suit has been instituted in the Supreme Court of the United States by the State of Georgia against one, Brailsford, a British subject to enjoin him from the recovery of a sum of money claimed by Georgia under her acts of confiscation during the revolutionary war. But it is speedily seen that this is not the sort of case to raise the momentous questions above suggested. It is true the plaintiff is a sovereign State, but the defendant is merely a private individual whose obedience to the court's decree can be easily compelled through the ordinary channels provided for the enforcement of judicial decrees. It is a case between a State as plaintiff and the citizen of a foreign State as defendant, and hence falls plainly within the judicial power of the United States and within the original jurisdiction of the Supreme Court. The court awards the injunction, and no doubt of its jurisdiction is even whispered.

The real test is yet to come. What will happen when it is sought to bring a sovereign State as a defendant before the court and to impose upon it the tribunal's decision?

We have not long to wait for an answer to some of these questions. Cases in which States are defendants begin to crowd the docket of the court. In the February term of 1793, two such cases are ripe for decision, and the court hands down its decision upon them.

One of these is an action at common law instituted by an individual named Oswald, against the State of New York. The State does not appear on the return of the process, and thus is presented for the first time this important question: What is the effect of a State's failure to appear in answer to the process of the court? This question the court temporarily declines to answer fully, contenting itself with the entry of

an order to the effect that "unless the State appears by the first day of the next term, or shows cause to the contrary, judgment will be entered by default against the said State." This order leaves the matter open to a certain extent, since it seems to admit the possibility that the State might be able to show cause why the court ought not to assume jurisdiction in such case or enter judgment by default.

And, indeed, there is good reason to doubt whether jurisdiction ought to be assumed, seeing that the State of New York is a sovereign State, while the plaintiff is only an individual, and that the rule of international law prescribes that no sovereign State shall be sued without its consent. True the State, by its ratification of the federal constitution, has solemnly agreed that the judicial power of the United States shall extend to all cases "between States and citizens of other States" and that the Supreme Court shall have original jurisdiction in all cases "in which a State is a party;" but the feeling is strong that the first of these provisions was intended to apply only to cases wherein a State is plaintiff, and that the States did not intend to surrender that attribute of sovereignty which would prohibit them to be used by individuals without their own consent.

But in the great case of *Chisholm's Executors v. The State of Georgia*, 2 Dall. 419, decided at the same term, upon practically the same state of facts, the court definitely settles these questions,—settling them, however, in a way which causes profound uneasiness among the people, and leads to a successful agitation for an amendment to the Constitution in effect overruling the court's decision.

The opinion in *Chisholm v. Georgia*, delivered in the February term of 1793,—the same term that has seen the order entered in *Oswald v. New York*,—reaffirms the order in that case. After directing that the declaration against the defendant State be filed and that copies of it be served on the Governor and the Attorney General of the State of Georgia, the court orders that

"Unless the said State shall either in due form appear, or show cause to the contrary, in the court by the first day of the next term, judgment by default shall be entered against the said State."

And in the February term of 1794, the State of Georgia remaining recalcitrant and declining to appear, a judgment by default is rendered for the plaintiff, and a writ of inquiry of damages is awarded.

The decision comes not only to the people of Georgia, but to the people of every State, as a distinct shock, and brings them to a sudden

sense of the seriousness of the situation. The judgment actually rendered by default against the State of Georgia at the suit of a private individual has aroused the fears and jealousies of the people on behalf of the sovereignty of the States to an extent much greater than might have been anticipated from the comparative calmness with which they had received the preliminary conditional orders of the court in *Oswald v. New York* and *Chisholm v. Georgia*.

But the agitation is directed only against that part of the decision which permits a judgment against a State at the suit of a private individual, and in no wise against the fact that a pecuniary judgment has been rendered against a State, or that judgment has been rendered by default in the absence of a defendant State duly summoned to appear.

As a consequence of the general uneasiness, an amendment to the Constitution is promptly proposed and ratified as soon as may be by the legislatures of the requisite majority of States, taking its place as the eleventh amendment to that instrument.

The amendment in effect reverses the decision of the Supreme Court so far as that court, by its rulings in *Oswald v. New York* and *Chisholm v. Georgia*, has determined that the judicial power of the United States shall be construed to extend to suits instituted by private persons against States. It provides that

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

But there is nothing in this language in the least condemnatory of the principle established in those cases that, in actions at law instituted by one State against another, to which the judicial power of the United States does extend, and in which the Supreme Court does have original jurisdiction, the court may enter a judgment by default against an absent defendant State duly summoned to appear.

This tacit acquiescence of the several States and their people in the latter principle is pregnant with meaning, if we remember the prevailing sentiment of jealousy on behalf of State sovereignty,—the very sentiment, indeed, that is operating at the moment so strongly as to induce, with little or no dissent, the proposal and ratification of the amendment which denounces any construction of the Constitution justifying the suing of a State by an individual. The failure to denounce, at the same time, the other ruling,—that a judgment by default might be rendered against a defendant State,—is evidence of the highest sort that the

people stand behind this portion of the decision, and recognize the necessity of such a ruling to the success of the grand experiment upon which they are embarked, whereby they hope to substitute the peaceful and judicial settlement of international disputes in the place of the dread arbitrament of arms.

It would, indeed, be hard to imagine a principle more essential to the success of such an experiment than the one here adopted, or one substantially similar. Without it, the court's jurisdiction would be entirely at the mercy of a State which might be defendant in any litigation, so that, should that State choose to withhold its appearance in answer to process, the court would be powerless to impose its judgment upon the recalcitrant defendant.

As early, therefore, as 1793 and 1794, it has become the practice of the Supreme Court in actions at law that a defendant State may be summoned to appear at its bar, and that, in default of appearance after proper service of process, an order will be entered that unless the State appear by the first day of the next term, or show cause to the contrary, judgment will be entered by default against the said State, and, if necessary, a writ of inquiry will be awarded. Such orders have actually been entered in the case of *Oswald v. New York* and *Chisholm v. Georgia*, but the pendency and ultimate ratification of the eleventh amendment puts an end to further efforts to execute them.

The mere pendency of the amendment, however, does not preclude the court from assuming jurisdiction of other cases instituted by private persons against States, so that it continues to receive and consider such cases until the final adoption of the amendment.

Among these are the cases of *Grayson v. Virginia*, 3 Dall. 320, and *Huger v. South Carolina*, 3 Dall, 339, decided respectively in 1796 and 1797, before the final ratification of the amendment.

These are suits in equity, not actions at law, and in each the defendant State has failed to appear after service of process, so that the court is called upon to determine what modifications, if any, shall be made in the rules of practice so far adopted in proceedings against absent defendant States.

In *Grayson v. Virginia*, the counsel for the plaintiff moved that a writ of *distringas* be awarded to compel the absent State of Virginia to enter an appearance, this being the method adopted by courts of equity and admiralty to compel the appearance of bodies corporate. He argued that there was no need of legislative authority to justify the

court in issuing the writ, but that the court was competent to furnish all the necessary means for effectuating its own jurisdiction.

The court deduces from the general custom and usage of courts of equity and admiralty a general rule for the government of its proceedings, but declines to follow that usage to the extreme limit suggested by counsel, seeming, however, to admit that the rules of practice it adopts in this connection are "subject to the interposition, alteration and control" of Congress.

The court embodies its deductions in two general orders,—the first dealing with the mode of summoning a defendant State, and the second with the procedure in equity cases should the defendant State fail to appear.

These two general orders have ever since controlled the procedure in suits brought against States in the Supreme Court, and are of such importance that they deserve to be quoted in full. They are as follows:

"1. *Ordered*, That when process at common law or in equity shall issue against a State, the same shall be served upon the Governor or Chief Executive Magistrate and the Attorney General of such State."

"2. *Ordered*, That process of subpoena issuing out of this court in any suit in equity shall be served on the Defendant sixty days before the return day of the said process; and further, that if the Defendant, on such service of the subpoena, shall not appear at the return day contained therein, the complainant shall be at liberty to proceed *ex parte*."

The first of these general orders seems merely to confirm and render compulsory the method of service of process already adopted in the case of *Chisholm v. Georgia*. The only question, so far as I am aware, that has ever arisen under this rule, was made in the case of *Huger v. South Carolina*, 3 Dall. 339, decided in 1797, the following year. In that case (which was also a case in equity) it appeared that a copy of the subpoena had been delivered to the Attorney General of South Carolina; and that a copy had been left at the Governor's house, where likewise the original had been shown to the Secretary of State.

Justices Iredell and Chase, says the report, "expressed some doubt whether showing the original to the Secretary of State would have been a service of the process conformably to the rule without leaving a copy at the Governor's house; but they agreed with the rest of the court in deeming the service under the present circumstances to be sufficient in strictness of construction, as well as upon principle." And the report goes on to say that "the service of the subpoena being thus proved, the complainant was entitled to proceed *ex parte*; and accordingly moved

for and obtained commissions to take the examination of witnesses in several of the States."

The second rule promulgated in *Grayson v. Virginia*, applicable to suits in equity, was the complement of that for actions at law laid down in *Oswald v. New York* and in *Chisholm v. Georgia*. In those cases it will be remembered, the defendant State not appearing, the court had ordered that "unless the State shall either in due form appear, or shall show cause to the contrary, in this court by the first day of the next term, judgment by default shall be entered against the said State," and in *Chisholm v. Georgia* had actually at the next term entered judgment by default and awarded a writ of inquiry of damages.

The second order in the *Grayson* case was the court's answer to the demand of the plaintiff's counsel that a writ of *distringas* be issued to compel the appearance of the defendant State. The court declined to issue this or any other writ to coerce the appearance of a State, nor did it order, as it had done in the cases at law, a decree by default, nor, as in ordinary chancery practice, that the bill be taken for confessed, but, pursuing a middle course, ordered that the complainant might proceed *ex parte*; that is to say, the court refused to render a decree against an absent defendant State, even though duly summoned, save after a presentation of its case by the complainant State, and a trial of it, as far as possible, upon the merits.

So far as concerns the judgment against a State by default in actions at law, I have been unable to find any decision of the Supreme Court dealing with that question since the earliest cases, already mentioned, of *Oswald v. New York* and *Chisholm v. Georgia*.

But in equity, since *Grayson v. Virginia* and *Huger v. South Carolina*, there have come before the court two cases wherein, in the absence of the defendant State, the court has found it necessary to consider anew the rule of procedure laid down in the *Grayson* case. Both were suits instituted by one State against another for the settlement of boundary disputes, and in both, the court sustained and extended the rule laid down in the *Grayson* case.

In 1831, the court handed down an opinion in the case of *The State of New Jersey v. The State of New York*, 5 Pet. 284. New Jersey had filed against New York in the Supreme Court an original bill in the nature of a bill to quiet title to certain territory claimed by both States as the result of unsettled boundaries. The State of New York, though properly summoned, had failed to appear and answer the bill, whereupon the court ordered that the State of New Jersey proceed *ex parte*,

and prepare its case for final hearing, and, further, that a copy of the order be served upon the defendant State.

No better illustration can be had of the caution with which the Supreme Court has approached the method of dealing with an absent defendant State than is offered by the action of the court in this case. Though steadfastly maintaining its rule that a plaintiff State might proceed *ex parte* to develop its case, despite the absence of the defendant State, it recognized that patience ought still to be exercised, and the defendant still be given a *locus penitentiae*. The court expressly ordered not only that New Jersey proceed *ex parte* and prepare its case for final hearing, but that a copy of the order be served upon the defendant State of New York.

"If," says the court, "upon being served with a copy of such order, the defendant shall still fail to appear, or to show cause to the contrary, this court will, as soon thereafter as the cause shall be prepared by the complainant, proceed to a final hearing and decision."

The court adds, however, the following significant sentence: "But inasmuch as no final decree has been pronounced, or judgment rendered in any suit heretofore instituted in this court against a State, the question of proceeding to a final decree will be considered as not conclusively settled until the cause shall come on to be heard in chief."

The fact that before this date no final judgment or decree had been pronounced by the court against an absent defendant State is explained when we remember that all prior cases involving this question, from *Oswald v. New York* to *Huger v. South Carolina*, had been suits instituted against States by private persons, and that the eleventh amendment had been adopted before any of them had reached the stage of final judgment or decree.

In 1832, in 6 Pet. 323, this cause came on to be again heard upon the question whether the filing of a demurer by the Attorney General of New York, without entering an appearance in the cause, could be regarded as a compliance with the order that the defendant State "in due form appear" by the next term, or show cause to the contrary. The court held that the filing of the demurrer constituted a sufficient "appearance to answer the bill" within the meaning of the order.

There is one other case in which a defendant State has declined to appear in answer to a bill filed in the Supreme Court. This is the case of *The State of Massachusetts v. The State of Rhode Island*, 12 Pet. 755, decided in 1838. The suit, however, was not actually decided on the merits until some years later.

In that case Rhode Island had filed a bill against Massachusetts to settle certain boundaries in dispute between them. Massachusetts had appeared by counsel and had filed an answer and plea to the bill, but had later moved to dismiss the bill for want of jurisdiction. The counsel for the State of Massachusetts, having understood from the language used by the court in overruling this motion, that it had based its decision upon the fact of the appearance, answer and plea of Massachusetts, asked leave of the court to withdraw that appearance.

The court, after assuring the counsel for Massachusetts that it had not intended to intimate that its jurisdiction in the case was dependent upon the appearance of the defendant State, permitted the State to withdraw its appearance, but at the same time authorized Rhode Island to proceed *ex parte* to the development of its case.

In the course of its opinion, the court especially referred to *Grayson v. Virginia*, in which, it will be remembered, a demand had been made by the plaintiff for a writ of *distringas* to compel the appearance of the State of Virginia. The court, declining to do this, had issued instead an order that, if the defendant State remained absent after due summons, the complainant would be at liberty to proceed *ex parte*. And this was held in *Massachusetts v. Rhode Island* to show that a defendant State's appearance is not to be coerced, even by prohibiting it to withdraw an appearance already entered.

Since 1838, no case has arisen wherein a defendant State has failed to appear and answer a complaint in the Supreme Court, so that our knowledge of the procedure in such cases must be gathered entirely from the decisions already commented upon. From these may be drawn the following:

SUMMARY OF CONCLUSIONS.

1. *Service of Process at Law or in Equity upon Defendant State.*—The proper mode of instituting a suit in the Supreme Court against a State, either at law or in equity, is to serve process upon the Governor or Chief Executive Magistrate (leaving it at his house if he be absent) and upon the Attorney General.

2. *Procedure by Default in Actions at Law against a State.*

a. In actions at law against a State, if the State do not appear in answer to the process, the court will direct the complainant's declaration to be filed, and copies of it to be served on the Governor and Attorney General of the defendant State, and will enter an order that "unless the said State shall either in due form appear, or show cause to the

contrary, in this court by the first day of the next term, judgment by default shall be entered against the said State;"

b. If the defendant State does not appear, as directed, by the first day of the next term, a writ of inquiry of damages may be awarded.

3. *Procedure by Default in Equity against a State.*

a. In suits in equity against a State, if process of subpoena has been served upon the Governor and the Attorney General of the defendant State sixty days before the return day of the process, and the State does not appear at the return day contained therein, an order is entered that the complainant State proceed *ex parte*, and prepare its case for final hearing.

b. A copy of this order is served upon the Governor and the Attorney General of the defendant State.

c. If, upon being served with a copy of this order, the defendant State still fails to appear, or show cause to the contrary, the court will, as soon thereafter as the cause shall be prepared by the complainant State, proceed to a final hearing and decision thereof;

d. The appearance of a defendant State will not be coerced by a writ of *distringas*, or otherwise; and if a State has entered an appearance, even though it shall have filed an answer and plea to the bill, it may withdraw its appearance, and will then occupy the same position as if it had never appeared.

e. The mere filing of a demurer to the bill, by the Attorney General of the defendant State, without the entry of any appearance, is a sufficient compliance with the order to appear and answer to the bill by the next term of court;

f. It has not yet been conclusively settled what shall be the nature and form of the final decree against an absent defendant State.

RALEIGH C. MINOR.

THE PATENT SYSTEM AND ITS RELATION TO THE EVOLUTION OF THE INDUSTRIAL ARTS.

The Patent System is the subject of criticism by every class of people who give it any attention. Manufacturers complain that it operates to the disorganization of their business; inventors that they cannot find a market for the products of their labors. Investors tell of many and grievous losses. The public complains of high prices and of the suppression of useful inventions. Proceedings in the Patent Office are difficult, tedious, costly and uncertain of outcome, and the expense and burden of litigation is all but intolerable. If the sum of opinion could be gathered, it would seem to be true that many countries have better systems than we, and numerous suggestions are made and pressed upon the attention of Congress for the purpose of correcting the manifold and, to the objectors, obvious deficiencies of our system.

It would be useless to enter a general denial in answer to the storm of criticism, and, in point of fact, some of the criticism is well founded. It may be useful, however, to restate the problem and to indicate a course of development which our system may undergo. For I believe that it can be readily shown both that the condition is not so hopelessly bad as is represented, and that the proper line of development, if our law is to be changed, is clearly indicated by existing equity practice.

The object of the Patent System as indicated in the constitutional provision is the promotion of progress. The field of operation is the industrial arts. To promote progress in the industrial arts is to assist the process of evolution of those arts.

Evolution of the industrial arts is not created by the statute, but by the pressure of enlarging human needs and desires. It will go on whether there is a patent system or not. Inventions will be made; new things developed and put into use whether those who are immediately involved in the development are given adequate reward or are denied reward. The character of the development would be modified. The condition under which development will occur would change. The tendency to secrecy in manufacturing operations would be accentuated. The reward to those who make valuable suggestions would be greatly reduced, and the conservative tendencies of manufacturers would be strengthened; but these are all differences of degree and not of kind. The speed with which evolutionary processes operate may be altered

by public policy, but the fundamental character of the evolution is not controlled thereby; on the contrary, it controls public policy.

Dealing as it does with an evolutionary process, the Patent System is open to all the difficulties inherent in evolutionary processes. These difficulties in the main are wastage of what has been done, and destruction of enormous numbers of individuals to the advantage of the few fitted to survive.

Let us apply these general considerations to a few specific criticisms and suggestions of change of our Patent System. It is constantly asserted that the inventor does not receive an adequate reward; that he should have a certain inalienable pecuniary interest in his invention, and that in his interest the law should require use of inventions as a condition to the retention of the right under a patent by an assignee.

Considered as a factor in an evolutionary process, what is the inventor engaged in? He is seeking the destruction of something which is in existence and the substitution therefor of something which he has to propose. He is a reformer; a rebuilders. He calls on all men affected by his suggestion to change their habits of thought or action; to scrap the tools they are familiar with; to learn how to use something which they do not understand; to take the risk that it will not meet their wants as satisfactorily as what they have; in a word to make themselves over in a sense in order that his mental conception may become standard practice.

Men who undertake reformation in any walk of life are liable to failure. Frequently, in the end they accomplish nothing or very little of what they have undertaken. No statutory enactment making any part of an inventor's right inalienable or prohibiting suppression of inventions will ever relieve him of any but a small part of the woes which he brings down upon his own head by undertaking to change the conditions under which mankind are living.

In a sense every man's hand is and will always be against the inventor. The manufacturer who has a large line of goods or machinery which suit the market is unwilling to change his types and will use every permissible artifice to oppose change.

The man whose factory is equipped with machinery suitable to the production of goods which he is able to market will not readily substitute new machinery for what he and his employes are used to handling and find serviceable, or for what he has already purchased and can replace only at grave financial risk.

Nor does the man who buys goods readily buy other goods different from what he has been accustomed to.

Every one resists change because change involves labor, expense and uncertainty. Every inventor finds it difficult to effect changes partly because the great majority of suggested changes are not worth while and partly because the process of educating masses of people to appreciate that one particular change out of a multitude is worth while is a costly and laborious process. But in the end where everyone accepts changes when convinced that they will pay and only when convinced that they will pay, those suggestions of change which will pay are almost certain to survive the struggle, and promote progress.

The proposal that an inventor shall have certain inalienable rights, for example, to a certain percentage of the returns of his invention, loses sight of other characteristics of evolutionary processes, namely, that the lines of advancement are not single and that the progression is frequently by minute gradations.

In conformity with this law, the progress of the useful arts is found largely to be due to a multitude of short steps along lines not necessarily parallel, but crossing each other. The finished thing which the public uses is usually the result of many inventions. Any attempt to improve the lot of the inventor by limiting the freedom with which he can dispose of the product of his talent will only introduce confusion, which would impair instead of improve his situation.

With all its defects, with all the numerous instances of sad failure, the fact remains that the Patent System is a great democratic force, bringing to innumerable individuals advancement beyond what they could achieve if the system were abolished.

So far the discussion has been directed mainly to considering the lot of the inventor. The suggestion that suppression of invention should be prohibited is also urged in the public interest. The patent statutes of many foreign countries contain provisions directed to the protection of the public interest which require what is known as "compulsory working" and "compulsory license" under patents. Generally speaking, these provisions have not justified their existence. They operate to impair the value of all patents by imposing burdens upon patentees and limiting their possible profits. Under the compulsory working clauses, some patents have been annulled, but the compulsory license clauses of foreign patent laws are seldom invoked.

I am convinced that it would be an unwise amendment of our statute to incorporate into it a provision for either compulsory working or

compulsory license. It is not, however, my purpose in this paper to present reasons for this opinion, but rather to point out that if there is or should arise a genuine public opinion in favor of compulsory license, it will almost certainly reflect itself and may be properly developed by the courts in the application of the equitable right of injunction. I shall illustrate my meaning by reference to a few cases.

In the *Paper Bag Case*, 210 U. S. 405, the Supreme Court had to deal with a patent on an invention which was suppressed by the patentee. The reason for suppression was set forth by the court as follows:

"What was that wrongful purpose? It was the purpose to make more money with the existing old reciprocating Lorenz & Honiss machines and the existing old complicated Stillwell machines than could be made with the new Liddell machines, when the cost of building the latter was taken into account. And this purpose was effective to cause the long and invariable non-use of the Liddell invention, notwithstanding that new Liddell machines might have produced better paper bags than the old Lorenz & Honiss machines or the old Stilwell machines were producing.

"But granting all this, it is certainly disputable that the non-use was unreasonable or that the rights of the public were involved. There was no question of diminishing supply or of increase of prices, and it cannot be said as a matter of law that a non-use was unreasonable which had for its motive the saving of the expense that would have been involved by changing the equipment of a factory from one set of machines to another? And even if the old machines could have been altered, the expense would have been considerable. As to the suggestion that competitors were excluded from the use of the new patent, we answer that such exclusion may be said to have been of the very essence of the right conferred by the patent, as it is the privilege of any owner of property to use or not use it, without question of motive."

In concluding its opinion the Court said (page 430): "Whether, however, a case cannot arise where, regarding the situation of the parties in view of the public interest, a court of equity might be justified in withholding relief by injunction we do not decide."

From this decision Justice Harlan dissented on the ground that the Court should have declined, upon grounds of public policy, to give any relief to the complainant by injunction.

In *Kintner v. Marconi Wireless Telegraph Co.*, 215 Fed. Rep. 104, the Court of Appeals of the Third Circuit sustained an order by Judge Rellstab refusing an injunction and merely requiring defendant to file

a bond because the defendant was not manufacturing machines such as were there involved, namely, wireless apparatus to be installed on ships. The reason assigned for refusing the injunctions was that if an injunction were granted ships could not be equipped with apparatus necessary to the saving of human life.

This was in fact granting to the Marconi Company a license against protest of the patentee.

In *Marconi Wireless Telegraph Co. v. Simon*, 226 Fed. Rep. 906, Judge Hough made the following statement, page 907: "An injunction, and especially one *pendente lite*, is always of grace and not of right. A complainant, however meritorious, may be sent over to final hearing, and even left to his accounting, rather than awarded a permanent injunction, for reasons which bear little, if any, relation to the merits of the controversy as between parties plaintiff and defendant."

According to the interpretation which in that case he placed upon the act of June 25, 1910 (36 Stat. 851), the general government is a licensee under all patents, and can protect contractors who are working for it against a charge of infringement.

On appeal (231 F.R. 1021) Judge Ward in his opinion said: "Courts, out of regard for public policy will no doubt refuse to interfere in proper cases with government activities by enjoining independent contractors as a matter of discretion, just as the District Judge has done, but the bill should not be dismissed even if the injunction be denied." The majority of the court, however, sustained the dismissal of the bill.

It will be apparent from the cases cited (and there are others not referred to) that the courts exercise considerable discretion in granting or refusing injunction relief.

I am by no means convinced that any modification of our present practice is required, but it seems to me clear that if compulsory license is to be introduced into our system, it should be effected, not by copying unsatisfactory provisions of foreign statutes, but by statutory enactment authorizing the refusal of relief by injunction and determining the conditions under which the relief may be refused.

THOMAS EWING.

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CHANGES IN THE FACULTY.

Hon. Thomas H. Anderson, LL.D., Associate Justice, Supreme Court of the District of Columbia, Professor of Domestic Relations, died suddenly just before the opening of the academic year 1916-1917. Professor Anderson had filled the chair of Domestic Relations for two years. John E. Laskey, Esq., United States Attorney for the District of Columbia, was appointed to the position.

A course in Argumentation and Forensic Oratory was organized on January 2, 1917, in charge of Prof. William C. Kavanagh, who will also supervise the work of the debating societies.

A course, entitled "American Legal Institutions," is being given at the Law School, beginning this year, by Hon. Henry S. Boutell, LL.D., formerly a member of the Illinois General Assembly and a Representative in Congress from that State, and recently Minister to Switzerland.

The course consists of three parts. Doctor Boutell takes up first the elements of law, discussing the fundamental conceptions of law, including legal rights and duties and a general treatment of the nature and sources of law. Next will come a survey of the history of English law, its development as a matter of historical growth—a very interesting part of the course, and of much practical importance as indicating the sources of American free institutions. The introductory part of the course will be concluded by a study of the conditions which surrounded and which brought about the adoption of the Constitution of the United States itself.

The main part of the course consists in a detailed discussion of the several articles and amendments of the Constitution, in the light of leading decisions of the Supreme Court of the United States, defining and applying the provisions of the Constitution to concrete cases.

The third part of the course consists in a thoroughly practical treatment of the mechanics of law making in the various States, the Congress of the United States, the Parliament of Great Britain and the Dominion of Canada, and in the Cantonal Legislatures of Switzerland. As Minister to Switzerland, Doctor Boutell had exceptional opportunities for observing and studying at close range the latest development of the democratic institutions and popular government, as well as the *Landsgemeinden* in the Six Cantons, where the statutes are still passed in the open-air assemblies of all the people as they were centuries ago. He will treat in general the procedure by which a provision is taken up by an American legislature, introduced in the form of a bill, referred to the appropriate committee, reported, debated and finally enacted into law. He will also discuss the rules for the construction and interpretation of statutes, and the leading cases on these subjects. Doctor Boutell has been in communication with the Attorneys-General, the Secretaries of State, and the Clerks of the Legislatures of all the States, and has secured in this way a large amount of material, not obtainable in any publication, for use in connection with his course. He has also obtained valuable data from his friends in the British Parliament with reference to the present legislative methods of Great Britain, and similar material from officials of the Canadian Parliament. Doctor Boutell's experience in the Illinois Legislature, where he was a member of the Judiciary Committee, and in the National House of Representatives, where he was a member of the Committees on Ways and Means, and Rules, ensure a practical as well as theoretical treatment of this course.

**FROM DEAN GEORGE E. HAMILTON'S OPENING
ADDRESS. ***

It was recently said by a distinguished lawyer and jurist that the profession of the law was on trial, and that notwithstanding its excellence in aim and accomplishment, there are conditions existing, and permitted to exist, in the practice and conduct of lawyers which give to the people cause of complaint, and to critics ground for the attacks which are too frequently made upon the profession and upon the courts, for courts and the profession are so bound together in our judicial system that an attack upon the courts is an attack upon the profession, and an attack upon the profession is equally an attack upon the courts.

You, who are now entering upon the preparation for the profession and for judicial office, should, at the very beginning of your studies, the threshold of professional life, dedicate yourselves, your abilities and labors to the duty of maintaining in the profession the standards of efficiency and morality, of conduct and practices which will place the bench and bar on a level above criticism and cavi, the level of high and honorable action and achievement.¹

No man should adopt the profession of the law or enter upon its study without a knowledge of its greatness and a fair appreciation of its duties and responsibilities. It is great because it has for its object the administration of justice, and justice is the measure of human greatness. The enforcement and protection of the rights of the individual depends upon justice, and its fair and rigid administration. Government is useful only so long as it upholds and maintains justice, and civilizations fail and fade when the spirit of justice ceases to animate and control the minds of men.

The profession of the law is said to be the handmaid of justice, and because of this relation there comes to every lawyer duties and responsibilities and obligations larger, more important, and perhaps complex, than to men of any other profession or calling. To meet these as they should be met requires the strength and courage and moral force of real manhood. It requires industry and perseverance and self-denial, hard study, absolute integrity and clean living always.

*Delivered October 2, 1916, in the Auditorium of the Law School.

¹ See Recent Cases, post, p. 38.

And you, who are entering upon the course of preparation which this School of Law places before you, should feel in its fulness the greatness of that for which you are preparing, and the responsibilities that you are assuming.

The course proposed offers you ample instruction in the principles of law and their application, in its duties and obligations, but without your co-operation in hard labor and close attention, and intelligent consideration, the seeds of knowledge placed before you will fall upon barren soil, and the labors of the Faculty will be for naught.

Remember always that mental proficiency, without moral force, will never make a good lawyer; that ability without equipment and training will not compel permanent success.

The profession requires, and should receive, from its every member, such integrity in act and purpose as will stand as a guarantee for the fulfillment of every duty—duty to court, to client and to the State, which is the people.

I ask you to take this as a message from the Faculty of the Law School of Georgetown University, and to unite with us in an earnest, honest effort to make yourselves lawyers worthy of the title, a title which, if earned and maintained always without stain or blemish, will constitute under our Republic the highest patent to nobility.

NOTES.

AGREEMENT AS TO HEIRSHIP IN CONTRACT OF ADOPTION.—In the recent case of *Winke v. Olson*,¹ the court were called upon to determine the right of inheritance of an adopted child where the parties to the contract of adoption had agreed that the foster parents should have exclusive control forever of the child; that they were to care for her in a parental manner and were “to enjoy all of the privileges of a child as if born by” them.

The doctrine of adoption, or the taking by one person of the child of another into his family to be treated as his own, is of civil law origin, and can be traced far into the annals of legal history. The Athenians, Spartans, Romans and ancient Germans were familiar with the doctrine.² That it was also known to the Babylonians is apparent from Section 185 of the Code of Hammurabi, compiled from 2285 to 2242 B. C., which provides that “If a man has taken a young child ‘from his waters’ to sonship, and has reared him up, no one has any claim against that nursling.”³

Although a practice of great antiquity, the adoption of children was unknown to the old common law of England,⁴ and in those states whose jurisprudence is based exclusively on the common law it can exist only by virtue of statute. It has been held that the right of heirship can be conferred by a person upon the child of another in accordance with the written law of a State,⁵ but where there is no statutory authority, except in jurisdictions whose system of jurisprudence is founded upon principles of civil law, it is not within the power of an individual to create the relation of parent and child by adoption.⁶ Hence, it would seem that a contract seeking to create such relation, in the absence of a statute on the subject, is unenforceable in a jurisdiction where the common law alone is recognized.

¹ 160 N. W. 164 (Wisconsin. Decided December 5, 1916).

² *Vidal v. Cammagère*, 13 La. Ann. 516.

³ *Hockaday v. Lynn*, 200 Mo. 456.

⁴ *Watts v. Dull*, 184 Ill. 86; *Hillers v. Taylor*, 108 Md. 148; *Ross v. Ross*, 129 Mass. 243.

⁵ *Renz v. Drury*, 57 Kan. 84, 45 Pac. 71; *Shearer v. Weaver*, 56 Iowa 578, 9 N. W. 907; *Willoughby v. Motley*, 83 Ky. 297.

⁶ *Matter of Ziegler*, 143 N. Y. S. 562.

The adoption of children was authorized by statute in the State where the case under discussion arose, and the question as to the adopted child's right of inheritance was dependent, not upon the validity, but upon the interpretation, of the contract. The general rule applied in the construction of an ordinary contract applies with equal force to an instrument purporting to be a contract of adoption. The intention of the parties as expressed in the words they have used should govern.

The object of adoption is to place as nearly as possible the child adopted in the place of a natural one; to give it the position in the family as the child both of the husband and wife, conferring on it rights and privileges of a child. The effect of adoption is to cast succession upon the adopted in case of the intestacy of the adoptive parents.⁷ Where a contract expressly provides for property rights,⁸ or by the language employed clearly shows that it was intended to confer upon the adopted the rights and privileges of a natural child, the right of inheritance will be upheld.⁹

In *Healy v. Simpson*,¹⁰ where a contract of adoption provided that the adopted child should have and inherit from the estate of the promisors "in the same manner and to the same extent that a child born of their union would inherit," it was held that, although the contract for adoption of the child was invalid because it was not executed in conformity with the statute, such part of the contract would be specifically enforced in favor of the heirs of the promisee against the heirs of the promisors.

It would seem, therefore, that the intention of the parties so controls the construction of a contract of adoption that, where an instrument, which plainly indicates an intention that the adopted child shall acquire property rights, is invalid as to the adoption, it may be specifically enforced as a contract securing property rights, and the right of inheritance thereunder will thereby be protected.

In the case considered the statutory method of adoption was not used; the contract made no reference, expressly, or by necessary inference, to the subject of property, and contained no words that indicated an intention on the part of the foster parents to cast succession upon the adopted child. It provided that the adoptive parents should "have all the time and privileges of a child" born to them, and that they

⁷ *Bray v. Miles*, 23 Ind. App. 432, 55 N. E. 510.

⁸ *Winne v. Winne*, 166 N. Y. 263.

⁹ *Crawford v. Wilson*, 139 Ga. 654, 78 S. E. 30.

¹⁰ 113 Mo. 340.

were "to care for said child in a parental manner" and to care for her "as if our own child." It was insisted that the parties intended by the word "privileges" to convey a right of heirship, but, in the absence of anything more, clearly indicating such intention, the instrument could not be construed as a contract of adoption conferring the right of inheritance.

H. D. G.

RIGHT OF COUNTY COMMISSIONERS TO ANNUL AND REVOKE FRANCHISE.—In the recent case of *State ex rel. v. Northern Ohio Traction and Light Co.*,¹ this question was recently presented to the Supreme Court of Ohio, and received a somewhat uncertain answer, three of the seven judges dissenting from a per curiam decision in which the court held, on the authority of *East Ohio Gas Co. v. City of Akron*,² that the Board of Commissioners of Stark County was acting within its rights in passing a resolution terminating the franchise of defendant corporation. A dissenting opinion was expressed by Judge Jones in which he very carefully reviews the law. It is to be regretted that the court did not also express an opinion, as the question is one upon which the available authorities appear to take an opposite view from that held by the majority, and especially as it hardly seems that the *Akron case*, upon which the court relies, presents the same question. The facts in the case are briefly stated in the dissenting opinion, and are in substance as follows. The County Commissioners of Stark County, Ohio, on February 22, 1892, passed a resolution granting to the predecessors of the defendant company the right to construct and operate an electric railroad on the State highway between Massillon and Canton. The grant was not for a definite time nor was there reserved in the granting resolution the power of revocation. The company issued bonds, and continued to operate the road until February 19, 1913, when the Commissioners, after a dispute with the railroad over reduction in fares, passed a resolution terminating the grant, and ordered the railroad company to remove its equipment from the State highway. It was recited in the resolution that since the terms of the grant in the original resolution were indefinite it continued only so long as the parties might agree. The Constitution of Ohio,³ however, provided

¹ 114 N. E. 53 (Ohio. Decided October 19, 1916).

² 81 Ohio St. 33, 90 N. E. 40.

³ Art. 1, Sec. 2. Art. 13, Sec. 2.

that the right of revocation, alteration or amendment of corporate grants and privileges shall reside in the legislature acting on its own initiative or by expressly delegating its power to municipal agencies. By statute ⁴ the legislature granted to Boards of County Commissioners the naked authority to grant, outside of municipalities, easements in the public highway and to fix the terms and conditions.

That a franchise granted by municipal ordinance is not a mere license but is the grant of a property right has been declared by the Supreme Court of the United States many times.⁵ It is plainly one of those corporate privileges referred to in the Ohio Constitution which the legislature alone has authority to alter or annul. Where the power to repeal or alter is not reserved in the law or the ordinance itself, any action repealing the franchise is an impairment of a contract within the contract clause of the Constitution, and void.⁶ The question of constitutionality cannot arise here since the Ohio Constitution reserves the right of repeal, but the question is one affecting simply the authority of the County Commissioners to revoke their grant by a resolution passed without any express delegation of power from the legislature nor by virtue of any reservation of the right of repeal in its own grant.

The County Commissioners, not having reserved any right to alter or repeal the franchise granted to the company, were incapable of interfering with the grant in any manner except in exercise of the police power. It was not suggested that they were exercising that power when they passed the repealing resolution, and, indeed, it would be impossible to do so. The police power does not imply the right to utterly destroy the property right as was attempted here. It is of the essence of the police power that it is regulative and not destructive. In *Grand Trunk Ry. v. South Bend*,⁷ it was said that "The power to regulate implies the existence, and not the destruction of the thing to be controlled. And while the city retained the power to regulate the streets and the use of the franchise, it could neither destroy the public use, nor impair the private contract, which, as it contemplated permanent, and not temporary, structures, granted a permanent, and not a revocable franchise." And further on, in regard to the authority of the city to grant or refuse consent to the use of its streets it was said that "It could have refused its consent, except on terms; it could

⁴ *Ohio Rev. Stat., Secs. 3438-3443.*

⁵ *Owensboro v. Cumberland Tel Co.*, 230 U. S. 66, and cases cited.

⁶ *Water Co. v. Boise City*, 230 U. S. 84; *Grand Trunk Ry. Co.*, 227 U. S. 544, 555.

⁷ 227 U. S. 554.

have forced the road to the outskirts of the town, or could have permitted the company to lay tracks in the more thickly settled parts of the city. When such consent was once given, the condition precedent had been performed, and the street franchise was thereafter held, not from the city, but from the State; which, however, did not confer upon the municipality any authority to withdraw that consent, nor was there any attempt by the Council to reserve such power in the ordinance itself." This statement of the law applies with equal force and propriety to the facts presented to the Ohio court.

The County Commissioners in the proper exercise of the power granted to them under the statute had the undoubted right to grant or refuse a franchise in the use of the State highways within their control. They had the right to grant the privilege on terms, and for a definite or indefinite period within the limits of the Constitution. They could have incorporated in their resolution a clause reserving the right to alter or repeal the grant. All these things they might have done but did not. Their grant was an indefinite one, subject only to the constitutional reservation of the right to alter or repeal all corporate privileges granted by the State. The Commissioners could not, solely by virtue of this constitutional reservation, oust the company from the privileges granted to it on the ground that it was a perpetuity. In other words an agency of the state, other than the legislature itself, cannot annul a franchise, unless the reservation is in the law which delegates the authority to the agency to make the grant.^a That was the precise point presented to the court in the present case. In deciding as it did the court seemed of the opinion that it was merely necessary to cite its opinion in *East Ohio Gas Co. v. City of Akron*, *supra*, but the facts in that case are not on all fours with the one under discussion. This was pointed out in the dissenting opinion in the principal case. "In the *Akron* case the legislation of the State with reference to gas companies became a part of the municipal grant, and that legislation provided that the municipalities were 'empowered to regulate from time to time,' the price of gas, and provided further that in case the price was fixed by the Council for a period not exceeding ten years, upon written acceptance by the company it should not be lawful for the Council to require gas to be furnished at a less price during the period agreed on, not exceeding ten years." Clearly this is not analogous to the present case. The County Commissioners did not have any

^a *Owensboro v. Cumberland Tel. etc. Co.*, 230 U. S. 58; *Weller v. Gadsden*, 141 Ala. 642, 37 So. 682.

such specific authority to enter into a contract with the grantee of the franchise. The right to use the State highway was a grant from them to the corporation of indefinite duration under a general law of the State. In such cases, as a general rule, a designation of streets by a city gives the company an irrevocable right to use the streets so designated for the purposes indicated in the statute, and the franchise so granted is subject only to repeal or alteration by the legislature.⁹ On this proposition the authorities are in substantial accord,¹⁰ and it seems that no case can be found holding that a municipality or any other agency of the legislature may revoke grants of franchises in the absence of a clause reserving the rights to so revoke either in the resolution or ordinance authorizing the grant or in the general law by which the agency derives the power to make the grant.

F. B. C.

WORKMEN'S COMPENSATION ACT—INJURIES ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT.—*Walther v. American Paper Co.*¹—Acts for the compensation of workmen have been enacted, in a number of States, which repeal the following defenses formerly available to the employer in cases where the employee was injured from an accident arising out of and in the course of employment: (1) contributory negligence of employee, (2) negligence of fellow servant, and (3) assumption of risk by employee. In general, these laws provide for a weekly payment varying in amount according to the nature of the injury and the amount of average weekly wage. It is also provided by these acts that if the injury received is due to the "serious and willful misconduct" of the employee, all right to compensation thereunder is lost.

Prior to the workmen's compensation acts, the employee, in actions of tort against the employer, was often prevented from recovering compensation for injuries sustained in the course of his employment because of the above mentioned defenses that were interposed by the employer. Said acts purport to furnish the employee compensation not only in those cases in which he already had a remedy, but also in cases

⁹*Hudson Telephone Co. v. Jersey City*, 49 N. J. L. 305; 8 Atl. 124.

¹⁰*Boise Water Co. v. Boise City*, 230 U. S. 84; *Old Colony Trust Co. v. Omaha*, 230 U. S. 100; *City of Ashland v. Wheeler*, 88 Wis. 607, 60 N. W. 818; *Weller v. Gadsden*, 141 Ala. 642, 37 So. 682; *Owensboro v. Cumberland Telephone Co.*, *supra*.

¹¹99 Atl. 263 (New Jersey. Decided November 20, 1916).

in which he would otherwise be barred from a remedy at common law. As remedial legislation, therefore, such laws should not be narrowly construed, but should be applied fairly and broadly with the view of conferring the benefits intended thereby.

A principal feature of the workmen's compensation laws is that compensation shall be made only in those cases where the employee "receives a personal injury arising out of and in the course of his employment." If a workman is injured while voluntarily doing something that is outside the scope of the work he is employed to do, it cannot well be said that such injury "arises out of and in the course of his employment."²

The question, therefore, as to whether a particular injury resulted from an accident "arising out of and in the course of the employment" has given the courts a great deal of trouble. To warrant recovery it must not only appear that the injury was the result of an accident which occurred "in the course of" the employment, but also that it arose "out of" the employment.³ It is not so difficult to determine the fact as to whether or not the injury occurred in the course of the employment, but the question as to whether the accident arose "out of" the employment has presented much difficulty and has given rise to some varied and rather curious decisions on the subject.

In the case of *Stuart McNicol*,⁴ the Supreme Judicial Court of Massachusetts gave a clear exposition of what is meant by the term "out of the employment." The deceased died as the result of kicks given him by a fellow workman who was intoxicated. It seems that the Superintendent was perfectly aware of the quarrelsome and dangerous disposition of the assailant while intoxicated, and knowingly permitted him to work on the day of the assault. In view of these facts the court found that the injury was one arising out of and in the course of the employment.⁵

² *Bischoff v. American Car & Foundry Co.*, 157 N. W. (Mich.) 34.

³ *Bryant v. Fissell*, 84 N. J. L. 72; 86 Atl. 458.

⁴ 215 Mass. 497.

⁵ The injury, as the court held, "arises out of" the employment, when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be said to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which can not fairly be traced to the

In *George C. Von Ette's Case*,⁶ the deceased was employed as a compositor in a poorly ventilated room on the six floor of his employer's building. It was customary among the compositors in the room, in order to escape the heat and get out into the fresh air, to descend the fire escape to the roof of an adjoining building. On the night in question, the decedent, while out on the roof of said adjoining building, fell therefrom and was killed. The evidence at the trial did not show that the deceased was guilty of any "serious and willful misconduct," nor that he was intoxicated at the time of the accident. The court found that the death of the compositor resulted from an injury arising out of and in the course of his employment.

A teamster while driving his employer's team upon a public street, in the course of his duties, was killed by a load of steel beams falling upon him as it was being hoisted to the eighteenth story of a building in process of erection. The death of the teamster was held to have been caused by an accident arising out of and in the course of his employment.⁷

In the case of a sudden and unlooked for misfortune,⁸ the injury will be deemed to have arisen out of and in the course of the employment. In this case the claimant, a driver for a brewery, was accidentally struck in the eye by the finger of a co-employee. It appears from the facts that the claimant approached the co-employee and cautioned him against using too much water. The co-employee slapped claimant on the shoulder, and as claimant turned around the co-employee's finger stuck in claimant's eye, causing injuries. The court held that the injury was clearly accidental within the meaning of the statute; that it was not expected or designed by the workman himself; and that it was one of the risks connected with the employment, flowing therefrom as a natural consequence and directly connected with the work.

employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incident to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."

⁶ 223 Mass. 56.

⁷ *Mahowald v. Thompson & Starrett Co.*, 158 N. W. (Minn.) 913.

⁸ *In re Heitz*, 218 N. Y. 148; 112 N. E. 750.

The New York court in the case of *Waters v. Wm. J. Taylor Co.*⁹ went still further in the interpretation of the words "arising out of the employment." The deceased was employed by a company having a contract for part of certain construction work. He was killed by a cave-in while endeavoring to release, from another cave-in, an employee of a contractor engaged in performing other work in the construction which necessitated excavation. The question raised was whether the general employment of the deceased included or authorized an attempt to rescue from sudden peril a fellow laborer working only a few feet away but for a different employer. It was held that this was a risk incident to and within the fair scope of his employment, and the workmen's compensation act should be so construed. The decision of the court was based upon the theory of humanitarian principles and also upon the ground that it must have been within the reasonable anticipation of the employer that the decedent should go to the rescue of a fellow workman, it being quite inconceivable that any employer should expect or direct his employees to stand still while the life of a fellow workman is jeopardized by such an accident as occurred here.

The Supreme Court of Massachusetts, however, in *William A. Harbroe's Case*¹⁰ did not go quite so far as the New York courts apparently did in the two foregoing cases. In the present case, one Harbroe was employed as night watchman by a construction company. One dark and foggy night while standing with a bridge operator near the buildings of his employer, they were approached by a deputy sheriff and his assistant. It seems that each pair of men mistook the other pair for yeggmen who a short time before had robbed a postoffice nearby. Shots were thereupon exchanged, causing the death of the watchman. The death of the decedent was held not to have resulted from an accident arising "out of" his employment, although it undoubtedly arose in the course of his employment. In reaching its conclusion, the court reasoned that it was clear the deceased was not protecting his employer's property from thieves when shot; that the property was in no way threatened, nor did the watchman suppose it was; that he was not fired upon simply because he was a watchman in charge; and that the injury inflicted was the result of an unfortunate misapprehension and cannot reasonably be said "to have had its origin in a hazard

⁹ 218 N. Y. 248; 112 N. E. 727.

¹⁰ 223 Mass. 139.

connected with the employment and to have flowed from that source as a rational consequence."

In *Craske v. Wigan*,¹¹ a leading case under the British Workmen's Compensation Act, which law is similar to the American acts, the facts are as follows: While a nurserymaid was sewing, a giant beetle flew into her room; and in throwing up her hand to protect her face from the insect, she stuck her finger into her eye causing injury which resulted in permanent defective vision. The court held that the risk was one common to all, an accident which might happen to anyone, and not one arising out of or caused by the employment. In the light of the New York cases, *supra*, it seems, that the risk in this case might have been brought within the act.

The question presented in the case of *Hully v. Moosbrugger*¹² was whether an injury resulting from horse-play or skylarking, so-called, can be said to arise "out of" the employment. The deceased was employed as a plumber and was on the way to his employer's shop, in the course of his duties, to procure some fittings. While passing, and attempting to dodge the arm of a fellow servant, which was swung at him in a spirit of play, the decedent slipped on the concrete and fell, sustaining injuries which caused his death. It was held that the injury received by the deceased arose from an accident clearly not within the scope of his employment, nor was it one arising out of a risk reasonably incident to that employment.

The facts in the case of the *Western Metal Supply Co. v. Pillsbury*¹³ are: One Mason, who was employed by plaintiff as night watchman, was killed while making his rounds of the premises, by an unknown person in the act of burglary. Held, that death was due to an accident arising "out of" his employment.

In the principal case of *Walther v. American Paper Co.*, *supra*, the decedent was employed as night watchman in the mill of the defendant paper company, and, while making his rounds, was suddenly struck over the head and killed by an employee of the same company, and robbed of his pay envelope containing about fifteen dollars. It appears that the assailant knew that the decedent had been paid off that day, and would probably have the money on his person. The assailant therefore had entered the mill and hidden himself behind some rolls of paper for the sole purpose of robbing the decedent, and apparently

¹¹ 88 N. J. L. 161; 95 Atl. 1007.

¹² 2 K. B. 635.

¹³ 156 Pac. (Calif.) 491.

without any intent to rob the mill or destroy any of its property. The court held that the death of Walther did not arise "out of" his employment. This case is distinguished from *Western Metal Supply Co. v. Pillsbury*, supra, in that in the present case the assailant had no intention of doing any injury other than robbing the deceased, while in the *Western Metal Supply Co.* case the assailant was in the act of burglarizing the premises.

It can be fairly deduced from the foregoing somewhat conflicting conclusions reached by the courts, that where the rational mind is able to trace the resultant personal injury to a proximate cause set in motion by the employment, and not by some other agency, the injury can reasonably be found to result from an accident arising "out of and in the course of the employment."

J. M. M.

RECENT CASES

ATTORNEY-AT-LAW — PROFESSIONAL ADVERTISING — MISCONDUCT —
DISBARMENT.

Respondent, an attorney-at-law, who made a specialty in the collection of delinquent accounts, sought by means of letters, circulars, folders, newspaper articles and advertisements to increase his practice. The methods he employed were in violation of Canon 27 of the Code of Ethics of the American Bar Association, adopted by the State of New York, which declares "solicitation of business by means of circulars or advertising, or by personal communications or interviews" on the part of an attorney to be unprofessional. Disciplinary proceedings were instituted by the lawyers' association charging respondent with malpractice and unprofessional conduct as an attorney and counsellor at law. *Held*, that respondent was guilty of misconduct, should be severely censured, and that a repetition of his soliciting methods would lead to disbarment. *In re Schwarz*, 161 N. Y. Suppl. 1079. (New York. Decided December 1, 1916.)

In commenting upon the methods used by respondent in soliciting business, the court said they "are typical of the modern advertising business methods, and would be appropriate to the exploitation of patent medicines or other proprietary articles," and his literature "reads like the advance bills of the late P. T. Barnum in heralding the approach of the Greatest Show on Earth." (p. 1084.)¹

W. B.

BLUE SKY CASES — CONSTITUTIONALITY OF ACTS — POLICE POWERS —
INTERSTATE COMMERCE — THE FOURTEENTH AMENDMENT.

Michigan, Ohio and South Dakota enacted statutes, popularly styled "blue sky" laws, which, in effect, imposed restraints upon the disposition of certain securities and required dealers therein to obtain a license. To procure the license, applicants were required to file with the superintendent of banks and banking certain information, giving the general plan and character of applicant's business, together with

¹ See Dean George E. Hamilton's opening address. *ante*, p. 25.

references, which might be investigated and confirmed by the commissioner, establishing the good repute in business of such applicant. The lower court, at the suit of several dealers in securities and investment companies, enjoined the enforcement of the statutes, and the commissioners appealed to the Supreme Court. *Held*, that the enactments were a proper exercise of the police power of the States; that they were not violative of the Fourteenth Amendment of the Constitution of the United States; that they did not conflict with the Federal right to control interstate commerce; and that the powers conferred on the commissioner were proper for his exercise, his discretion being qualified by his duty, and the statutes affording judicial review of his action. *Hall v. Geiger-Jones Co. et al.*, 242 U. S.—(Ohio. Decided January 22, 1917.)

L. H. V.

BREACH OF CONTRACT — PROXIMATE CAUSE — DAMAGES.

The defendant contracted to install fire extinguishing machinery in the plaintiff's box factory. By the terms of the contract no time was limited for performance of the agreement. While the work was in progress, some three months after the date of the contract, a fire occurred resulting in a serious loss to the plaintiff, which instituted the present action to recover damages for the loss, due to the failure of the defendant to perform its contract, as agreed. At the trial, it developed that the plaintiff had not, at the time of the fire, installed the underground pipes necessary to connect the fire extinguishing apparatus with the water supply, as it was by the terms of the agreement bound to do. *Held*, that the proximate cause of the loss was the fire and not the breach of contract by the defendant. *Brookings Lumber & Box Company v. Manufacturers' Automatic Sprinkler Co.*, et al., 161 Pac. 266. (California. Decided November 23, 1916.)

As the court points out, under the circumstances of this case, where it was necessary to send long distances for the material, the trial court found a reasonable time for performance had not elapsed when the fire occurred which destroyed plaintiff's building; according to the general rule where no specific time is limited by the parties in their agreement, the defendant company should be allowed a reasonable time for performance. Even if defendant had fully installed the machinery at the date of the fire, the plaintiff had not completed its portion of the contract calling for a proper connection with an adequate water supply, and, therefore, the apparatus could not have been used to extinguish the fire.

G. E. E.

DECEDENT—ESTATE—PARTY INTERESTED—LETTERS OF ADMINISTRATION—POWER OF COURT TO REVOKE.

Decedent, a married woman, died possessed of only personal property. It appeared that she and her husband had not lived together for more than fifteen years next preceding her death, during all of which time she had resided with her adult children within the District of Columbia. About a month after the death of the mother the oldest son made application to the Probate Court for letters of administration upon the estate of his mother, advising the Court, among other things, that his father had not been seen nor heard from for more than fifteen years. The son was appointed administrator of the estate, qualified as such, and proceeded with the duties of his office. Six weeks later the husband appeared and filed a petition for revocation of the grant of administration to the son, advising the Court that at the time application was made he was a resident of the State of South Dakota, and contending that inasmuch as he was living at the time of the death of decedent, the son could not be entitled to administration, and was not a "party interested" in the estate of his deceased mother. *Held*, the husband was entitled to the whole of his deceased wife's personal estate; the son had no interest therein, and that letters of administration granted upon a misstatement or misconception of the facts may be revoked and the party really entitled thereto appointed. *Emery v. Emery*, 45 App. D. C. —; 45 Wash. L. R. 11. (District of Columbia. Decided January 2, 1917.)

Even though the son was regularly appointed administrator, qualified as such, and entered upon the duties of his office, the Court, when it made the original grant of administration, acted upon a mistaken statement of facts, in that it did not know that the husband was alive, and when the husband did appear and assert his right, he should not be deprived thereof by the presumption of his death.

INSURANCE — ACCIDENT INSURANCE — PTOMAINÉ POISONING — "ACCIDENTAL MEANS."

An accident policy insured the plaintiff's husband "against loss resulting directly and independently of any and all other causes from bodily injury effected solely through external, violent and accidental means." The insured died because he ate mushrooms tainted with

ptomaine poison, not knowing that they contained a poisonous substance, but supposing them to be edible. The policy contained a clause relieving the company from liability in case of injury "resulting from or contributed to, directly or indirectly, wholly or partially, by disease." *Held*, That the plaintiff could recover. *United States Casualty Company v. Griffis* (Indiana, Nov. 21, 1916; 114 N. E. 83).

The distinction between a mere accidental result, and the means producing the result, which must themselves be accidental in order to permit recovery under the accident policy, is fundamental and well established. *Smith v. Travellers' Assn.*, 85 Fed. 401; 40 L. R. A. 635; Fuller, Accident and Liability Insurance (1913), p. 32. Whether the death or injury is within the meaning of the expression "accidental means," has given the courts some trouble in cases where the insured ate unsound food, in ignorance of its unsound condition. *Maryland Casualty Co. v. Hudgins*, 97 Tex. 124; 76 S. W. 746; 64 L. R. A. 349. The reasoning of the court in the principal case proceeds upon the theory that the eating of the food, as unsound, was unintentional, and, therefore, accidental. The means by which death was caused may be resolved into the physical act of ingesting the food, and the mental condition of the insured which accompanied this act. It is clear that the physical act was not accidental, regarded in itself, for the insured intended to do the very thing he did. *McGlinchey v. Fid. Cas. Co.*, 80 Me. 251; 14 At. 13. With respect to the mental condition of the insured, it would seem to amount at most to ignorance of the unwholesome condition of the food; in other words, the insured did not know that the food would cause ptomaine poisoning, amounting, therefore, simply to unconsciousness of the result of his act. Yet the court expressly says that a mere accidental result will not suffice. *Accidental Means*, Cornelius, page 57 et seq. The case may be reconciled upon the rule of construction, applied to accident policies, that uncertainties as to the meaning of words are to be resolved most strongly in favor of the insured. *Paul v. Travellers' Ins. Co.*, 112 N. Y. 479.

INSURANCE — TEN-DAY OCCUPANCY CLAUSE — FORFEITURE — GENERAL RULE OF CONSTRUCTION — MERE SUSPENSION.

Plaintiff's policy in the defendant insurance company contained the clause usually found in fire policies, stipulating that if the property insured be left unoccupied for more than ten days, without the consent of the company, the policy should become void. Several times during

the term of the policy the plaintiff left the premises unoccupied for longer than ten days, but when the fire occurred, the premises were occupied. When suit was brought to enforce payment the insurance company relied on the breach of this provision. *Held*, that the plaintiff should recover; failure to keep the building occupied suspended but did not terminate the insurance. *Beecher v. Vermont Mutual Fire Insurance Company*, 98 A. 917. (Vermont. October 10, 1916.)

There is a line of authority on this principle of insurance law to the effect that the violation of such a provision renders a policy void, and calling for adherence to a strict interpretation; still the decision of the court in the present case finds support in not a few courts. *Insurance Company of North America v. Pitts*, 88 Miss. 587, 41 So. 5, 117 A. S. R. 756, 9 Ann. Cas. 54, and note 7 L. R. A. (N. S.) 627; *Sumter Tobacco Warehouse Company v. Phoenix Insurance Company*, 76 S. C. 76, 10 L. R. A. (N. S.) 736, 121 Am. St. Rep. 941, 11 Ann. Cas. 780. In the *Sumter* case it is pointed out that the decisions are in hopeless conflict, with the weight of authority supporting the decision in the present case.

In reasoning to a liberal construction of this provision, the court asserts in the principal case that, to hold any other way, would enable the company to retain the entire premium, part of which has not been earned, by taking advantage of a forfeiture due to an innocent violation of an unimportant provision in the policy, which in no manner contributed to the loss. It might be remarked that this construction of the occupancy clause, favorable as it is to the insured, is in accord with the rule of construction of insurance policies, that such contracts are to be construed by the courts strongly against the insurer and in favor of the insured, especially where a forfeiture is involved. *Hunt v. Springfield Fire & Marine Insurance Co.*, 196 U. S. 47, 14 R. C. L. 926.

Decisions construing the occupancy clause in the fire policy constitute a thoroughly typical example of the conflicts in insurance law. An unoccupied house is not apt to be well taken care of, and the company has the right to avail itself of the additional security afforded when people are regularly on the premises. The parties may make their own agreement, and not infrequently it can fairly be said that, where the condition against unoccupancy is positive in terms, the parties have agreed that unoccupancy is per se an increase of risk, and therefore, ipso facto terminates the policy. *Moore v. Phoenix Insurance Company*, 64 N. H. 140. The principle case finds noteworthy support in Illinois. *Insurance Company v. Garland*, 108 Ill. 220.

G. E. E.

INTERSTATE COMMERCE—CARRIERS—PERSONAL INJURIES—NEGLIGENCE
—FEDERAL EMPLOYERS' LIABILITY ACT.

Plaintiff was a hostler in the yards of the Southern Railway Company, lessee of the defendant, and it was his duty to prepare engines for use in interstate commerce. On the evening in question he fitted out an engine for its run from Charlotte, N. C. to Greenville, S. C. About an hour later, his day's work having been completed, he started for his home, by the usual route, which lay across the yards and switching tracks of the defendant. Before leaving the yards, he met with an accident, which resulted in the loss of his leg; it was alleged that this was due to negligence on the part of the defendant. *Held*, that plaintiff was, at the time of his injury, engaged in interstate commerce, within the meaning of the Employers' Liability Act.¹ *Hinson v. Atlanta & Charlotte Air Line Railway Company*, 90 S. E. 772. (North Carolina. Decided December 6, 1916.)

The Supreme Court of the United States, in the case of *Pederson v. Delaware, L. & W. R. Co.*, 229 U. S. 146, held that an employee of a carrier engaged in interstate commerce who was killed while carrying a sack of bolts, for use in repairing a bridge, an artery of interstate commerce, was employed in interstate commerce and entitled to recover under the Employers' Liability Act.

In *North Carolina Railroad Company v. Zachary*, 232 U. S. 248, it was decided that a railway fireman who had prepared his engine for an interstate run, and was killed while crossing defendant's yards to his boarding house just prior to making the trip, was at the time engaged in interstate commerce.

The principal distinction between *Hinson v. Railway Company* and *Railway Company v. Zachary* lies in the fact that the plaintiff in the former case had concluded his labor for the day and was on his way to his home; whereas in the latter case, plaintiff's interstate was temporarily absent from his engine, but, as the Supreme Court held, was still "on duty" and therefore employed in interstate commerce. Employees were "on duty," it was held by the Supreme Court in the case of *Missouri, K. & T. R. Co. v. United States*, 231 U. S. 112, 119, which involved an infraction by the railroad of the hours of service act of March 4, 1907,² when "they were under orders, liable to be called upon at any moment,

¹ 35 Stat. L. 65.

² 34 Stat. L. 1415.

and not at liberty to go away." It would appear that Hinson, having completed his labor for the day, was at liberty to leave, and was not subject to orders rendering him liable to call at any moment.

G. E. E.

INTERSTATE COMMERCE — STATE POLICE REGULATIONS — SEPARATION
OF RACES — CONSTITUTIONAL LAW — DUE PROCESS
OF LAW — CARRIERS.

A statute of Mississippi required railroads to provide equal but separate Pullman accommodations for white and colored races, by supplying two or more cars for each train, or by dividing the cars so as to secure separate accommodations, where the number of negro passengers in Pullman cars was small. *Held*, a reasonable police regulation, applying to interstate as well as intrastate commerce, and not confiscatory or a taking of property without due process of law. *Southern Railway Company v. Norton*, 73 South. 1. (Mississippi. December 4, 1916.)

Following the reasoning in *Smith v. State*, 100 Tenn. 494, 46 S. W. 566, and *Alabama & Vicksburg Railroad Company v. Pearl Morris*, 103 Miss. 511, 60 South. 11, the Court held that the race separation statute here in question is valid, and that it may be enforced as to both intrastate and interstate passengers, regardless of the additional expense imposed upon the common carrier in complying with it.

W. R. G.

MANN ACT — CONSTITUTIONALITY — TRANSPORTATION FOR IMMORAL
PURPOSE.

Petitioners were indicted for "transporting and causing to be transported and aiding and assisting in obtaining transportation for a certain woman" from one State to another for an immoral purpose, and were convicted under the Act of Congress of June 25, 1910 (Mann Act, 36 Stat., 825), which makes it an offense to "knowingly transport or cause to be transported, etc., in interstate commerce, any woman or girl for the purpose of prostitution or debauchery, or for 'any other immoral purpose.'"

It was contended that the Mann Act was designed to reach only "commercialized vice," and not a case such as this, that unless the Act be so construed it would be open to constitutional objections. *Held*,

that the Act is constitutional, embraces transportation for all purposes by it denounced, and judgment affirmed. *Caminetti et al, Petitioner, v. United States*, 242 U. S.—(California. Decided January 17, 1917.)

Citing in support of constitutionality of Act the cases of *Hoke v. United States*, 227 U. S. 308; *Athanasaw v. United States*, 227 U. S. 326, and *Wilson v. United States*, 232 U. S. 563.

L. H. V.

PERSONAL INJURY — MALPRACTICE OF ATTENDING PHYSICIAN — RELEASE — DISCHARGE OF ALL LIABLE — JOINT TORT FEASORS.

Plaintiff sustained an injury to his left leg, through the negligence of his employer, the Great Northern Railway Company, and was sent by the railroad to the company's physician, for treatment. Through malpractice on the part of this physician, the plaintiff became worse and, although he subsequently went to another surgeon who performed an operation, he did not recover. Plaintiff filed suit against the railroad; later he executed a release, which recited that it was given in consideration of the sum paid as compensation for the injury, "including all claims" for loss of services, medical, surgical or hospital treatment arising out of "any and all personal injuries sustained by me at any time or place while in the employ of said railroad company." The release further stated that the sum was "in full settlement of any and all claims of every kind."

Plaintiff then instituted this action against the company's physician, seeking to recover damages for injuries resulting from malpractice. Defendant set up the release. *Held*, the malpractice of the defendant was a part of the original injury for which the railroad would have been liable to respond in damages and was covered by the release. *Martin v. Cunningham*, 161 Pac. 355. (Washington. Decided December 5, 1916.)

G. E. E.

BOOK REVIEWS.

A TREATISE ON FEDERAL IMPEACHMENT. *By Alexander Simpson, Jr. The Law Association of Philadelphia. August, 1916.*

The author was one of the counsel for respondent in the Archbald Impeachment Trial, and this little book is the result of his labors in that case.

The text is short and concise. For instance, the history of the law of impeachment is condensed into two pages. However, the author names the books, an examination of which will put one in full possession of the subject.

Some fifteen pages are devoted to a compilation of the history of all provisions of the Constitution relating to impeachment. The author has in this short space gotten together apparently all the debates and reports of the constitutional convention.

About fifty-five pages are then devoted to discussing the various questions which may arise upon the trial of an impeachment, including possible changes in procedure and some discussion as to the adequacy of the remedy. The remainder of the book is an abstract of articles of impeachment in all English and Federal American cases.

The author says that the first great question on the subject is whether on the trial of an impeachment the Senate sits as a court. He argues forcibly that this must be answered in the affirmative. If the author is correct in his conclusion it means that the Senate is acting in a judicial capacity and is exercising part of the judicial functions of the United States. It is true that some text writers have expressed this view; but it is opposed to the fundamental conception that our government is divided into three distinct branches, and that upon the courts is cast the entire judicial power.

The author calls attention to the fact that in the impeachment of President Johnson the Senate expressly ruled that it sat as the Senate and not as a court.

The author collects a number of constitutional provisions which he urges support his contention that the procedure is a judicial one. Throughout the Constitution with reference to impeachment are used the expressions "try," "tried," "convicted," "judgment in case of impeachment," "conviction," and "trial." The author lays considerable

stress upon the fact that in all impeachment trials the Senators, the managers of the House and the counsel for the respondent have frequently referred to the Senate as a court; he has even counted the exact number of times the Senate was so designated in a number of the trials.

In some trials the action taken has been that appropriate to a court. For instance, in one the defendant was arrested and required to give bond. In another instance the respondent's incriminating statement made before a committee of the House was excluded under section 859, R. S. U. S., which provides that such testimony may not be given in evidence in any criminal procedure in any court of the United States.

Curiously enough Mr. Wrisley Brown, also engaged in the Archbald case, but on the other side, has written an article on the Impeachment of The Federal Judiciary. This article was published in the *Harvard Law Review* for June, 1913. Mr. Brown reaches the conclusion that the Senate does not sit in a judicial capacity and his argument appeals to us as the stronger. Briefly it is this:

The English Parliament was a court having wide criminal jurisdiction. Originally it might try any subject, for any offence, upon complaint made by any individual. It might impose the same punishment as any criminal court. Among the punishments inflicted by it was that of removal from office. Gradually the impeachment developed as we understand it at the present time, and the question of removal from office came to be the most important feature. Though the House of Lords still had the right to impose criminal punishment, there thus developed the two functions—the political one of removing an unfit person from office, and the judicial one of punishing a man for a past crime. The framers of our Constitution wisely separated these two powers. The punishment for a violation of the criminal laws was expressly left to the judiciary. The political power to remove from office was conferred upon the Senate.

Mr. Simpson next discusses at great length the question of what offences are impeachable.

Sec. 4 of Article II of the Constitution reads:

"The President, Vice-President and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery or other high crimes and misdemeanors."

The author is of the opinion that this language is not confined to indictable offences, and there seems to be no escape from the correctness of his conclusion. However, he argues that the offence must

be of so high a character that it may properly be made criminal. In other words, it must be morally wrong and analogous to a crime; that it must in some way affect the administration of the office from which it is sought to remove the offender, and that it must be one which tends to bring the office into ignominy and disgrace. These limitations which the author would impose upon the power are doubtful.

The author thinks that impeachment will lie for offences committed before the respondent took office; but is inclined to think that they must have some relation to his accession to the office, and be reasonably near in point of time. That is, he thinks a man might be impeached for bribery in securing his election or appointment; but that he could not be removed for a crime committed before, for which the respondent had atoned either by suffering a punishment or by living it down. As to whether a person may be impeached after he has ceased to be an officer of the United States, the author is in doubt. The question has arisen but once in our history, and the author thinks it is a moot one not likely to arise again.

Turning from the legal to the practical side of an impeachment trial, the author, speaking from his own experience, thinks that the testimony might well be heard by a committee instead of by the entire Senate. In the Archbald case he says about twenty or thirty Senators attended regularly. He thinks the inability to compel a full attendance might well be frankly admitted and a select committee appointed to take the testimony. He goes further and suggests that the testimony might be taken by deposition before the United States judges in the districts where the witnesses reside. He thinks this would be far more convenient to the witnesses, and that the failure of the Senate to see the witnesses would be more than offset by having the judges rule upon the admissibility of the testimony. Incidentally it might be cheaper for the respondent.

The suggestion that the testimony be taken before a committee is probably a good one. However, I do not think it would be wise to take the testimony by depositions.

The question of costs might be met by having the government pay all or part of the fees of necessary witnesses. But as one who has brought witnesses from all parts of the country to a given point for trial, and has also taken depositions all over the country, the writer thinks that counsel are better able to present a case to a tribunal when the witnesses may all be brought together at the same time.

Finally, the author puts the question, as the most important one, "Is impeachment an adequate remedy?" He reminds us that in the United States there have been only nine impeachments—one of a President, one of a Senator, and one of a Cabinet Officer, and six of Judges. The Senator was held not to be an officer of the United States. Mr. Simpson thinks it unlikely that a President or Cabinet Officer will ever again be impeached. The great use of the impeachment will continue to be against judges. As to them the author thinks it too cumbersome. He is opposed to the recall of judges, but thinks there should be some easier way of removing an incompetent judge. He suggests that Congress by law define "good behavior" during which the judges hold office, and a judge be ousted from office if he is guilty of misbehavior as so defined. Instead of having the question determined by the Senate he would keep it in the judiciary. He would have a District judge tried by the appropriate Circuit Court of Appeals, and a Circuit judge by the Supreme Court. As to the Supreme Court judges, he thinks it would be undignified to permit them to be tried by their official inferiors, and therefore they must be tried by the Senate.

It is a little difficult to see how Congress can so define "good behavior" as to include any offence which is not impeachable under the construction originally placed upon the expression "high crimes and misdemeanors." If this is so, the author's suggestion simply amounts to transferring a portion of the impeaching power to the judiciary. This it would seem would require a constitutional amendment.

Finally, Mr. Simpson gives an abstract of the articles of impeachment in every case in England and the United States. These abstracts occupy the bulk of his book. They are very interesting to the pleader and to the student on the subject of impeachment. It is apparently the only complete collection of such precedents. In itself it is a striking history of the subject, and forcibly illustrates the fact already pointed out that in early days in England an impeachment would lie against any citizen for any offence and might be started by any complainant.

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THOMPSON ON INSURANCE—VOLUME I, PERSONAL INSURANCE, EM-
BRACING THE SCIENCE, THE PRACTICE AND THE LAW OF INSURANCE
OF ALL FORMS RELATIVE TO PERSONS. By *Joseph J. Thompson,*
LL.B., of the Chicago Bar; Professor of the Law of Insurance,
Loyola University, Chicago. Loyola University Press, 1914.

The method of treating the branches of Life, Accident and Health Insurance, Employers' Liability Insurance, and Social Insurance, followed in this volume, is somewhat novel. As the author himself states in the Foreword (page iii): "There are many works on insurance extant, and the addition of another to the array could be justified only by evidence of additional information, or a more useful presentation. If the sum total of information be not increased by this work, the hope is entertained that the effort will be found to be justified by the manner of presentation." Life Insurance, for example, is covered by a text of eighty-five pages; following this, there are sixty-one pages, interleaved, of notes, which, in the customary form of treatise, would be presented in footnotes. The same plan is followed with Accident and Health Insurance, Employers' Liability Insurance, and Social Insurance, constituting, respectively, Parts Two, Three and Four. Under the heading "Annotations and Leading Articles," beginning on page 326, there is a topical reference to notes on Insurance; these references are virtually confined to three or four law journals, and to the notes in the *Lawyers' Reports Annotated*, no reference being made to valuable annotations of current decisions in the *Harvard Law Review*, the *Columbia Law Review*, the *Michigan Law Review*, and other university law magazines. As the author also states, some information concerning the science, the law and the practice of insurance is essential to an intelligent grasp of the subject; to present this comprehensive view, in a brief way, is the object of the present work, though, as the author states, "Regarding citations, no attempt is made at inclusiveness" (page v). With this purpose in mind, the author has included a number of references in the body of the work, and in the appendix, to mortality tables, the mathematics of premiums, standards of the underwriters' solvency, cash surrender and loan values, and other topics of actuarial science, somewhat outside the scope of the usual treatise on the law of insurance.

The division of the general subject into Personal Insurance, the title of the present volume, which treats of life insurance policies, and

into Property Insurance (page 321), the title of the companion volume, differs fundamentally from the accepted classification. The volume forms a basis for the preparation of one's own treatise on the subject.

H. J. F.

THE LAW OF THE PUBLIC SCHOOL SYSTEM OF THE UNITED STATES.

By Harvey Cortlandt Voorhees, of the Boston Bar, Author of "The Law of Arrest in Civil and Criminal Actions," Editor of "Stimson's Law Dictionary," Revised Edition. Boston: Little, Brown and Company, 1916.

In one of his essays, entitled "How to Know the Fallacies," Samuel M. Crothers makes the observation: "You are doing what most Americans do. Whenever they find anything wrong, they lay the blame on the Public Schools." Many of these go further and, with characteristic American litigiousity, question in the Courts the authority of the officers and teachers of their schools. Hence a substantial body of law has developed in connection with our public school system. This law of the public schools, Mr. Vorhees analyses and discusses in his latest book, a work admirable in the choice and treatment of its material and excellent in all its mechanical features. The book consists of 385 pages of text, arranged in eleven chapters, divided into 179 consecutively numbered sections; a full and accurate index of 43 pages; a table alphabetically arranged in 40 pages of the cases cited in the text; a preface of 2 pages by the author, and a helpful table of contents of 6 pages.

The Eleventh Chapter of 105 pages, with only one citation and four notes, contains a synopsis of the statutes of the 48 States relating to public schools. This chapter would have been more nearly complete had it included the laws of the territories and the insular possessions, and the omission of the laws of the District of Columbia is a distinct defect. The District of Columbia has a school population of about 55,000, with more than 1,700 teachers, and spends annually on its public schools more than three and a half million dollars. The school system of the District has some interesting and unique features, particularly in the organic law under which it is conducted. A comparison of National and State laws relating to public schools, and the results attained under National and State legislation, would be valuable and suggestive. The other chapters respectively treat of: The General

Principles, School Districts, School Property, School Officers, School Teachers, Pupils, Rules and Regulations, Books and Studies, School Funds, Taxes.

A glance at the titles of a few of the sections will show the wide range and interest of the subjects treated by the author: What is a Public School? Father's Duty to Educate. Compulsory Education. Status of School Districts. Power to Provide Land and Buildings. Exclusiveness of Use for School Purposes. Offenses against School Property. Saloons and Intoxicants. Meetings of School Directors. Making Contracts. Acts Ultra Vires of School Officers. Duties of Treasurer. Employing Counsel. Duties and Qualifications of Teachers. Religious Garb. Bible Reading and Religious Worship. Right to Chastise and Expel Pupils. Control of Pupils. Health Regulations. Separate Schools. Rhetorical Exercises and Dialogues. Composition and Debates. Tardiness. Secret Societies. Football Playing. Conduct of Pupils Outside of School. Prescribing Studies. Free Books. Studies Prescribed or Prohibited by Parent. Apportionment of Funds. School Bonds. Apportionment of Taxes. Exemption of Taxes.

The extent and character of the litigated questions that have been determined in connection with our public school system are strikingly shown in the cases cited by the author. These number more than 1,600 in the ten chapters, or an average of six cases to every 250 words of the text.

Mr. Vorhees is quite too modest in the hope expressed in his preface, that his book will be found helpful to school officers and lawyers. Every school library and every students' society and club should have a copy of his work. It will be helpful to National and State legislators, and to almost all general readers who believe that, while the glory of the United States is her public schools, they can and ought to be improved. Mr. Vorhees shows how many improvements may be made.

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THE LAWS OF UNINCORPORATED ASSOCIATIONS AND SIMILAR RELATIONS. By *Sidney R. Wrightington*. Boston: *Little, Brown and Company*, 1916.

The corporate form of organization has lost none of its popularity with our men of business. Its positive advantages are great and well known, and it would appear that corporations are being formed in greater numbers today than at any other period. Individuals and partnerships, in increasing numbers, are taking advantage of the franchise extended by the government and incorporating their businesses of whatever nature they may be. The corporation is, however, not without its disadvantages and burdens. In particular they have been the mark for drastic taxation and hampering restrictions. To avoid these a scheme has been brought into more or less perfection which embraces many of the advantages of the corporation and seeks to avoid some of its drawbacks. This is accomplished by an adaptation of the old and well known unincorporated association of individuals to modern conditions, the salient feature of which consists of a transfer of the assets of such organization to trustees to hold upon express trusts. The scope of these trusts determines the character of the association, and the rights and liabilities of those uniting in this manner for the transaction of business, and in drafting them many of the immunities and advantages of a corporation are embodied in their provisions. These organizations have been considerably developed in Massachusetts, and in a number of decided cases their underlying principles have been considered and sustained.

The most valuable portion of this work is devoted to a consideration of such organization. The author has at the same time given a broad survey of all associations organized without incorporation whether their object is profit or non-profit, and has made a very satisfactory exposition of a subject too frequently obscured by the clouds of misunderstanding. The author's style is positive and convincing.

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GEORGETOWN LAW JOURNAL

CONTENTS

	PAGE
Conflicts of Opinion in Insurance Laws— Hugh J. Fegan.....	1
Necessity for Arraignment and Plea in Criminal Cases—Jesse C. Adkins.....	12
Appeals from the Supreme Court to the Court of Appeals of the District of Columbia in Disbarment Proceedings— Arthur A. Alexander.....	17
The Limits of Ownership Under Patent Rights—Francis S. Maguire.....	26
Editorial	31
Notes	33
Recent Cases	48
Book Reviews	55

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No. 2

CONFLICTS OF OPINION IN INSURANCE LAW.

Few considerations are of more insistent importance in the study of insurance law than its curious conflicts of opinion, which have frequently been the subject of comment.¹ It is singular that we should find the law of insurance, so important an element in trade, marked by uncertainty today, since the demand for definite and uniform rules of law now, as always, has been particularly urgent from the commercial world.² Organized commercial intercourse is based upon credit, impossible without the protection of a definite body of legal rules, under

¹ " * * * the chaos of decisions that are so often obscure, as well as contradictory." Cooke, *Life Insurance*, Preface (May, 1891).

See also remarks of John A. Finch, Esq., of Indiana (XIX Rep. Am. Bar Assn., pp. 31, 32, 1896). After referring to the large sums of money represented by outstanding policies, he said: " * * * the law by which the contracts covering this almost inconceivable sum are construed is almost absolutely chaotic. The law now is in a confused and contradictory condition. * * * It would be the duty of the proposed section on Insurance Law to bring to the attention of the Association at large the vicious legislation affecting the companies and the anomalies in the decisions of the courts upon their contracts."

"It is unnecessary, and it would be a hopeless task to enter upon the dreary wilderness of judicial decisions upon the subject of insurance, with the view of deducing a rule from it for our government in the present instance." Morris, J., in *Dumas v. Ins. Co.*, 12 D. C. App., 245, 255 (1898).

" * * * the needed crystallization of this branch of the law from its present amorphous condition." Vance, *Insurance*, Preface, vii (1904).

" * * * out of all the existing confusion and chaos * * * " Clement, *Fire Insurance* (September, 1905).

See Richards, *Insurance*, Preface, 3rd Edition, page v, where, speaking of the tendency of the courts to construe policies favorably to the insured, he says: "This purpose of the courts has found expression in various rules or doctrines, the application of which, by no means concordant in the many jurisdictions of this country, has also exhibited a varying degree of departure from common law canons, as applied to other branches of the law * * * " (1914).

"Accident policies have, from the very nature of things, been drawn in many different ways. For this reason, and because of the limited character of the hazard insured against and the difficulty of stating that hazard in general terms, it is not surprising that there is much confusion and misunderstanding in the law." Cornelius, *Accidental Means*, Preface (November, 1916).

" * * * in all commercial transactions, the great object is certainty. It will, therefore, be necessary for the court to lay down some rule, and it is of more consequence that the rule should be certain, than whether it is established one way or the other." Willes, C. J., in *Lockyer v. Offley*, 1 T. R. 259 (1776)). This is needed in insurance also; see the record of the continual struggle for uniformity in insurance law in the reports of the American Bar Association's Committee on Uniform State Laws, beginning with XIV Rep. Am. Bar Assn., p. 368 (1891).

which property rights are enjoyed and business enterprises fostered. Indeed, the author of the first modern work on insurance repeatedly and pointedly refers to the "system of insurance," as a valued feature, and develops this thought in his book.³ Today the law has acquired a new power of accommodation to commercial needs, and, in this respect, it is better equipped to do substantial justice in commercial causes than when the law of insurance was in the making. The merchant of the early eighteenth century sought in vain for a court, which would be properly informed upon commercial usage and able to enforce its decrees.⁴ Several fruitless experiments were tried, but it was not until Mansfield's appointment to the bench that the common law judge saw the light. Campbell could say truthfully that, before that time, "Mercantile questions were so ignorantly treated when they came into Westminster Hall, that they were usually settled by private arbitration among the merchants themselves."⁵ In 1704, Lord Holt, himself, had refused to allow the endorsee of a promissory note to recover upon it, because, at common law, a chose in action could not be assigned; the custom of merchants in such cases, continued for thirty years before, and the effect of his ruling upon business had no weight with him.⁶ In fact, the common law, as a system of social justice, had perhaps reached the limit of its development, as theretofore administered, unaided by larger contributions from the juristic thought of nations other than England; it was beginning to lose touch with the fresh and vigorous life around it. Alone, it was not sufficient to meet the needs of the rapid growth of English commerce.⁷ The inelastic and somewhat meagre system of the common law, hampered by the inbreeding of Coke and the bias of judicial thought of the men of his tradition, quickened with new life through the introduction of the foreign strains of equity

³ Park, Preface to *Marine Insurance*, Vol. I, pages xii, xciv (8th Ed. by Hilliard, 1842). His object in writing the book is "to prove to the world that the doctrine of insurance now forms a system as complete in every respect as any other branch of the English law."

⁴ " * * * * the merchant courts, whose great weakness lay in the lack of a sheriff, * * * * " Vance, *Insurance Law, Select Essays in Anglo-American Legal History*, Volume III, p. 98.

⁵ Campbell's *Lives of the Chief Justices*, Vol. IV, p. 112. As showing the dearth of litigation on insurance among merchants, see also Stat. Elizabeth, ch. 12 (1601), " * * * * heretofore such assurers have used to stand so justly and precisely upon their credits, as few or no controversies have arisen thereupon, * * * * "

⁶ *Butler v. Crips* (6 Mod. 29).

⁷ " * * * * no man qualified to form an opinion upon the subject, can think that the common law of England, as we find it in the old text books and reports, was a perfect code, adapted to the wants of a civilized, commercial nation." Campbell, *Lives of the Chief Justices*, Vol. IV, p. 165.

and the law merchant. Mansfield's solid achievement in framing the commercial code of England, by infusing the customs of merchants into the "freshly growing fabric of the common law," is the more remarkable in a judge of his type, educated in the narrow, rigid, intensive school of the common law, and descended too from noble Scottish ancestry, with an aristocratic contempt for trade. In a small man this hereditary feeling might have been heightened by the reduced circumstances of his early life,⁸ for it was not only that the common law judge loved the law of his day more, but that he sympathized less with the merchant and his usages.⁹ There was, in fact, a chasm of caste between the judge and the merchant. It was his breadth of view which made Mansfield, as has been remarked of Chief Justice Shaw, a great magistrate.¹⁰ When he retired from the bench, he was able to read the eulogy of Mr. Justice Buller, who called him "the founder of the commercial law of England."¹¹ Mansfield's work has proved of enduring value.¹² It is a far cry indeed from Lord Holt's refusal to enforce the right of the endorsee of a promissory note, because the common law forbade the assignment of a chose in action,¹³ to the recent ruling of the Supreme Court of the United States that the assignee of a valid policy of life insurance, though he has no insurable interest, may recover upon the policy.¹⁴ Lord Holt belittled the "mighty ill consequences that it was *pretended* would ensue by obstructing this course," and asked

⁸ See Campbell, *Lives of the Chief Justices*, Vol. III, pp. 392, 393, where Mansfield is quoted as saying: "My father was a man of rank and fashion," and Campbell's slighting references to the poverty of the Murrays; he relates how the future Lord Chief Justice rode a "wretched pony from Perth to London." But see page 433, *ibid.*, where he speaks of Murray's talents and preparation for legal work: "There had not hitherto appeared at the English Bar a young man so well qualified to follow the law as a liberal profession."

⁹ Sometimes it had been thought necessary to point out that the plaintiff was a gentleman, not a merchant. *Sarsfield v. Wetherby*, Carthew, 82 (1692).

¹⁰ " * * * the strength of that great judge lay in an accurate appreciation of the requirements of the community, whose officer he was. Some, indeed many, English judges could be named who have surpassed him in accurate technical knowledge, but few have lived who were his equals in their understanding of the grounds of public policy to which all laws must ultimately be referred. It was this which made him, in the language of the late Judge Curtis, the greatest magistrate which this country has produced." Holmes, *The Common Law*, page 106.

¹¹ *Lickbarrow v. Mason*, 2 T. R. 63.

¹² "The early law was adverse to the alienation of property and to the assignment of contracts. The modern law is favorable to bringing all things *intra commercium*." "Growth or Evolution of Law," Richard M. Venable, XXIII Am. Bar Assn. Rep., 278, 284 (1900). Mansfield's work has been regarded as well nigh indispensable. Pound, *Uniformity of Commercial Law on the American Continent*, VIII Mich., L. Review, 91, 105.

¹³ *Butler v. Crips*, 6 Mod. 29.

¹⁴ *Grigsby v. Russell*, 222 U. S., 149 (1911).

"why do not dealers use that way which is legal?" So complete has been the change in the judicial point of view, that Justice Holmes says: "So far as reasonable safety permits, it is desirable to give to life policies the ordinary characteristics of property."¹⁵ Notwithstanding the far more sympathetic attitude of courts and of the bar¹⁶ toward commercial usages and needs,¹⁷ the conflicts of insurance law persist. The causes, then, for the lack of uniformity in the law of insurance in this country today must be sought elsewhere than in such a narrow view as marked the seventeenth century judge.

A source of inconsistency, lying on the surface, but occasionally more than superficial in its effect, is the "inaccurate language" of some courts in decisions, often lengthy, involving the principles of insurance—the failure to differentiate between dictum and decision.¹⁸ How deeply this may arrest the evolution of a consistent body of insurance law, is illustrated by the famous case of *Warnock v. Davis* (104 U. S. 775, 1881.) In this case one Crosser entered into an agreement with a trust company, which had no insurable interest in his life, by which Crosser was to take out insurance on his own life, payable to himself; the policy was then to be assigned to the trust company, which, on Crosser's death, was to pay one-tenth of the sum due under the policy to Crosser's widow, retaining the balance itself; the trust company paid all the premiums. On Crosser's death, the trust company collected the sum due, and paid one-tenth of it to the widow, retaining the balance, as agreed. Crosser's administrator sued the trust company to recover the balance. The Supreme Court decided that the assignment was invalid, and allowed the plaintiff to recover. The case, therefore, presented a clear instance of fraudulent collusion to cloak a lack of insurable interest; this vitiated the assignment, and the decision of the court was admittedly correct.

¹⁵ *Grigsby v. Russell*, 222 U. S. 149, 156 (1911).

¹⁶ The United States is pre-eminently the land of the business spirit. The business man has been for a generation our type and exemplar. Hence, not unnaturally, lawyers have come to be pure business men." Pound, Uniformity of Commercial Law on the American Continent, VIII *Michigan Law Review*, 91, 105.

¹⁷ Section 7 of the Negotiable Instruments Act of 1897 is as follows: "In any case not provided for in this act the rules of the *law merchant* shall govern."

¹⁸ " * * * that in deciding Insurance cases, rather more frequently than in deciding cases on other subjects, judges have been prone to use inartistic and inaccurate language, and that consequently it is important to ascertain exactly what was the problem presented, and exactly how it arose, and to lay stress upon what the court did, and not merely upon which the judges said; * * * " Wambaugh, Preface, *A Selection of Cases on Insurance* (1902).

The fact that courts seem unable to avoid lengthy discussions in deciding insurance cases has been pointed out. "Insurance cases, especially those of more recent date, are usually long and generally involve many different issues." Vance, Preface to *Cases on Insurance* (1914).

But, Mr. Justice Field, who wrote the opinion, said, in the course of it: "The assignment of a policy to a party not having an insurable interest, is as objectionable as the taking out of a policy in his name." (104 U. S. 779.) In using the word "assignment" the court had in mind such an assignment as the one before it, a colorable assignment, arranged to defeat the requirement of an insurable interest. The opinion was interpreted, however, quite literally, to apply to all assignments of a life policy to one without interest, and there was confusion as to the position of the Supreme Court for thirty years;¹⁹ the Supreme Court did not have an opportunity to make its position clear until 1911.²⁰

Other causes contributing to the conflicts of opinion in insurance law lie much deeper. The heavy loss of life during the Civil War brought home the uncertain tenure of human existence in an arresting way; a general ignorance of the true function of the theory of risk exaggerated what could be accomplished by insurance; these factors combined to produce an enormous growth in the business of life insurance. Men were fascinated by the very novelty of the idea of insurance.²¹ A few stock companies had been able to carry on the business for the country in 1840; by 1870 there were over one hundred active companies in the United States, with outstanding policies aggregating over a billion dollars.²² So rapidly did the business grow that trained men to organize it, upon a scientific basis, could not be produced in sufficient number when they were needed. Unsound financial methods

¹⁹ Among the cases citing and following *Warnock v. Davis* are the following: *Missouri Valley Life Ins. Co. v. McCrum*, 12 Pac. 517, Kansas; *Stoelker v. Thornton*, 6 So. 680, Alabama; *Manhattan Life Ins. Co. v. Hennessey*, 99 Fed. 64, 70. "The rule established by the latter court" (Supreme Court of the United States) "is that the assignee must have an insurable interest." See *Russell v. Grigsby*, 168 Fed. 577, 582, where Judge Lurton cites *Warnock v. Davis* as one of the decisions of the Supreme Court of the United States referred to by counsel on both sides of the case to sustain their contention. For a further comment on the opinion in *Warnock v. Davis*, see Vance, Insurance, page 140 *et seq.*

²⁰ *Grigsby v. Russell*, 222 U. S. 149, 156, 157, where Justice Holmes refers to *Warnock v. Davis*, as an "intimation," to the "language" of that case, and then goes on to say that "there has been no decision" disposing of the question in the Supreme Court of the United States (1911).

²¹ "With the companies ignorantly transacting business on false assumptions, the masses of people were led to believe that a new device had been discovered, whereby men could obtain protection for almost nothing." Zartman, History of Life Insurance in the United States, Yale Readings in Insurance, Life Insurance, Chap. VI, p. 88.

²² Zartman, Yale Readings in Insurance, Chap. VI, p. 86.

were almost inevitable.²³ The depression in business in the early seventies still further complicated affairs. To protect themselves, insurance companies, not infrequently, adopted a litigious attitude toward policyholders, and, upon technical defenses, threw cases into court which might well have been settled without a contest. Apparently, the very contracts of insurance were drafted so as to defeat recovery upon them. The bench, reflecting popular feeling, reacted strongly to the belligerent attitude of the companies.²⁴ Later, the investigations of the Armstrong Committee in New York disclosed how sinister a temptation was carried by the enormous assets of large companies. It was felt that something had to be done to prevent discrediting the entire business of insurance; the panacea was thought to lie in legislation. The stringent acts passed in the State of New York were followed by other states, in reliance upon the position of the Supreme Court of the United States, that the regulation and control of insurance companies was a matter for State, and not for Federal action.²⁵ Naturally, the determination of what was proper regulation, in life insurance and in other branches, varied in the different state legislatures.²⁶ Courts, too,

²³ Vance, Insurance, p. 15. There is lay testimony that this condition was duplicated in England. See Dickens, Martin Chuzzlewit, Chap. II, page 11, where the operations of the "Anglo-Bengalee Disinterested Loan and Life Insurance Company" are described.

²⁴ See the tirade of Chief Justice Doe against the insurance companies of his day in *DeLancey v. Rockingham Mut. Fire Ins. Co.*, 52 N. H. 581. "Some companies chartered by the legislature as insurance companies, were organized for the purpose of providing one or more officers, at headquarters, with lucrative employment,—large compensation for light work,—not for the purpose of insuring property; for the payment of expenses, not of losses * * * * There was no stock, no investment of capital, no individual liability, no official responsibility,—nothing but a formal organization for the collection of premiums, and their appropriation as compensation for the services of its operators. The principal act of precaution was to guard the company against liability for losses. Forms of applications and policies (like those used in this case), of a most complicated and elaborate structure, were prepared and filled with covenants, exceptions, stipulations, provisos, rules, regulations, and conditions, rendering the policy void in a great number of contingencies. Seldom has the art of typography been so successfully diverted from the diffusion of knowledge to the suppression of it. * * * * As a contrivance for keeping out of sight the dangers created by the agents of the nominal corporation, the system displayed a degree of cultivated ingenuity which, if it had been exercised in any useful calling, would have merited the strongest commendation. * * * * (May, Insurance, Vol. I, Section 180a, calls this a "graphic and masterly statement" and says the "learned Chief Justice seems to have said, in a very striking and effective way, what many other judges must often have thought.")

²⁵ *Paul v. Virginia*, 8 Wall. 168 (1868); *Hooper v. California*, 155 U. S. 648 (1895)

²⁶ "Legislation always tends to produce localization in law. It lacks the check of universal theory which restrains jurists and judges." Pound, Uniformity of Commercial Law on the American Continent, VIII Michigan Law Review, No. 2, p. 102.

differed in their rulings on similar issues, either—though this was not always perceived—because the statutory law of the state applicable to the case was not the same as in other jurisdictions, or because there was room for divergent views of what were the local requirements of public policy, a matter always difficult of precise determination.²⁷ Added to this are the variations in the interpretation and enforcement of statutes applying to insurance companies by the state departments of insurance. Legislative and administrative action, because often emphasizing very strongly local conditions, is certain to produce a lack of uniformity in the requirements operating upon insurance companies throughout the United States.²⁸ The courts, as a branch of state sovereignty, have been inclined to look to precedents in their own jurisdiction.²⁹ Naturally, the interpretation of insurance contracts has varied, even though the standard form of policy is coming more and more into general use throughout the country. The insurance company is, of course, an expert in its own business, and has framed with care and deliberation the form of contract by which it is to be bound; this is sufficient to justify the rule of strict interpretation applied to insurance contracts in favor of persons insured.³⁰ But the rule of strict construction, while uniformly applied, has not produced uniformity in results.³¹ Instead of adhering to the construction placed by the courts upon their policies, insurance companies have frequently attempted to meet each new interpretation by a change in the wording of their con-

²⁷ "That the law has recognized one sort of public policy as a foundation for its judgment at one period, and another sort at another period, is undoubted. From these varying applications of the principal called 'public policy,' I think it obvious that no accurate definition of that phrase can be devised in respect to any particular matter." Magie, C. J., in *Trenton P. Ry. Co. v. Guarantors L. Ins. Co.*, 60 N. J. L. 246, 248.

²⁸ See "Problems arising from Conflicting State Laws and Department Rulings relating to Life Insurance." L. G. Fouse, Proceedings of Association of Life Insurance Presidents, January 19, 20, 1910, p. 23, for a statement of the difficulties in complying with the many conflicting state laws and rulings.

²⁹ " * * * * the fact that courts of last resort, in the larger states, now rarely cite decisions from the other states, as they did a generation ago, all tend to prevent that approach to unity, which the existence of the common law might be supposed to foster." Address of Lyman D. Brewster, Uniform State Laws, XXI Am. Bar. Assn. Rep. 316, 1898.

³⁰ "The policy, although of standard form, was prepared by insurers, who are presumed to have had their own interests primarily in view, and hence when the meaning is doubtful it should be construed most favorably to the insured who had nothing to do with the preparation thereof." *Matthews v. American C. Ins. Co.*, 154 N. Y. 449.

³¹ See, for example, *Steinbach v. Ins. Co.*, 13 Wall. 183, and *Steinbach v. Ins. Co.*, 54 N. Y. 90, where the Supreme Court of the United States and the Supreme Court of New York reached opposite conclusions upon identical provisions in the two fire insurance policies covering the same property, the loss being the same.

tract, and thus escape liability.⁸² This shortsighted policy has reacted upon the companies themselves, by introducing further uncertainty and inconsistency into the law of insurance, and by tending to create a hostile attitude toward the companies.⁸³

I venture to say that among the chief causes of inconsistency and conflict of opinion in insurance are the following: 1. The use of careless or inaccurate language by the courts occasionally in decisions upon insurance cases; 2. The second cause is historical and transitional. The rapid growth of the business of insurance was attended by unsound financial methods in many companies, and the continuance of such companies depended upon their ability to defeat, through litigation, the payment of sums due under their policies. Investigations disclosing the enormous assets of large companies, showed, too, that these assets were not always wisely managed, and confirmed the tendency of courts and legislatures to hold the companies strictly to their undertakings. Naturally, legislative and judicial views of what was needed in the way of regulation have varied, because the problem has always important local features, in which the larger needs of consistency and uniformity have not been fully considered. Much of the legislation is also open to criticism, and has probably been enforced, sometimes,

⁸² "The forms of policies have been frequently changed in an effort to adjust them to judicial decisions upon controverted points. It is a matter of regret that the insurance companies have not shown a greater disposition to retain the condition and forms which have been judicially construed, and in this way, gradually evolve a contract in which the rights of both parties might be approximately exact in their construction. The introduction of new obligations and changes of phraseology mark the date of legal controversies and thus become an index to the maturing law of this branch of insurance." Fuller, *Accident, Employers' Liability Insurance*, Preface, p. vi. "These variant policies furnish ample proof of the manner of their growth; their complicated provisions, bristling often with technicalities and arbitrary conditions, are largely the composite product of the ingenuity of the insurance companies in their effort, from time to time, to meet the decisions of the courts, fixing their liability, * * * *"

⁸³ Report of the Committee on Insurance to the Conference of Commissioners on Uniform State Laws, Vol. XXX, Part II, 1906, page 336, Rep. Am. Bar Assn.

⁸⁴ "It would be an easy matter for insurance companies to devise policies which, while they would more carefully protect their interests than those now in general use, would also at the same time protect the interests of the assured. There is no reason why organizations whose purpose is so beneficent and so essential to the manifold business interests of the country should not be popular with the people, except the circumstance that by their contracts and by the litigious attitude of some of them, they have created a feeling in the minds of the people that they are constantly attempting to overreach and cheat their unwary patrons. I do not believe that many of these companies are actuated by any such motives, but rather that they have adopted their form of contracts under the impression that these conditions are necessary to protect them against fraud on the part of the assured, but as a result of this course the courts are compelled to look for reasonable grounds upon which to defeat the unjust operation of their contracts, instead of giving them the effect which is given to ordinary contracts." Wood, *Fire Insurance*, Preface to 2d Edition, May 1, 1886.

in what has been called "the predatory spirit of politics." Meanwhile, the individual underwriter is extinct; the corporate form of organization has been tested and found best adapted to serve the public in the capacity of insurer.³⁴ A very great part of the business of insurance is national in character, though local as far as its regulation is concerned; the net result of these divergent rules is an increased operating cost for the insurance companies, which must, of course, be borne finally by the policyholders. This has been realized by insurance men.³⁵

Several remedies have been proposed to secure uniformity. A direct attack has been made upon the line of decisions of the Supreme Court, beginning with *Paul v. Virginia*,³⁶ declaring that insurance is a mere incident of commercial intercourse, and not commerce within the meaning of the Constitution, and, therefore, not a proper subject of legislation by Congress.³⁷ A model code of insurance law has also been prepared, with great care, for the District of Columbia, with the view of securing its adoption by Congress, and, following that, its enactment in the States.³⁸ Many of the conflicts of insurance law seem to be beyond the reach of a purely legislative remedy. The most perfect insurance code, after it has been enacted, must receive judicial interpretation, and lawyers know how often interpretation may produce widely differing results out of the same language. Judicial interpretation or legislative action will not be uniform until the pressure of local needs, as they are seen locally, gives way before a broader vision in the legal profession, and in the legislatures, with respect to insurance.³⁹

It is well to recognize that part of the conflict of opinion in the law of insurance we may have always with us. From the broader outlook

³⁴ So true is this that in Pennsylvania it has been held constitutional for the State to confine the business of insurance to corporations. *Commonwealth v. Vrooman*, 164 Penna. 306.

³⁵ Addresses of John F. Dryden.

³⁶ 8 Wall. 168 (1868).

³⁷ See Majority Report of the Committee on Insurance Law, XXVIII Am. Bar. Assn. Reports, p. 494 *et seq.* (1905).

³⁸ "American Bar Association, Report of Committee on Insurance Law, 1916, and Third Tentative Draft of Proposed Law Regulating Insurance in the District of Columbia," June 16, 1916; opening paragraph of Arthur I. Vroys, Chairman. A constitutional amendment providing for a uniform contract, to be uniformly interpreted through the Federal courts has also been suggested; see "Fire Insurance, Insurer and Insured," by Wm. B. Ellison, Esq., of the New York Bar.

³⁹ This should lead to a change in the tendency of juries to be strongly prejudiced against insurance companies. Ellison, *Fire Insurance, Insurer and Insured*, p. 21.

of the jurist and legal philosopher, inconsistencies, the empirical and tentative advance in the determination of legal principles, to be made good later, are conditions of development, part of the gradual process of evolution, which is continually at work in the legal organism, by the law of its growth.⁴⁰ It may well be, too, that inconsistencies in the law of insurance are not greater than have been declared to exist in other branches of the law.⁴¹ All this is part of the continual struggle for law.⁴² The broader vision will come, in part, from a study of the principles of insurance as a science, from the point of view of the actuary, as well as of the lawyer.⁴³ This should be accompanied by a firmer conviction that law is a means, justice the end; a clearer understanding of insurance as one of the most effective forms of social co-operation, before which local conditions are seen in a new light. This is part of the movement toward a new social justice.⁴⁴ The power of accommodation to present needs is inherent in our law; it has been said that the Anglo-American system of jurisprudence has never failed us, but will prove adequate, in the hands of the legal profession, as it did in Mansfield's day, to the needs of the community; but it has also been well said that this development must come *mainly* from within, and not *wholly* from without.⁴⁵

⁴⁰ "The truth is the law is always approaching, and never reaching consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow." Holmes, *The Common Law*, page 36.

⁴¹ "The pronouncements of independent courts are in constant contrast." Wigmore, *Preface, Treatise on the System of Evidence in Trials at Common Law*, Vol. I, page ix.

⁴² "There is in all modern states today a general conflict between certainty in the law and concrete justice in its application to particular cases; in other words, between the effort to have a general rule everywhere applicable to all cases at all times and the effort to reach what may be concrete right dealing between the parties at bar upon the particular facts in each case." Mr. Frederic R. Coudert, quoted in *The Organization of the Courts for the Better Administration of Justice*, W. L. Ransom, *Cornell Law Quarterly*, Vol. II, No. 3, p. 189 (March, 1917).

⁴³ "In the department of law there is also much weakness regarding the principles of insurance, and but few lawyers have any grounding whatever in the fundamental ideas at the root of all insurance plans. The result is that many conflicting decisions have been rendered by judges who frequently have only the haziest notion of the scientific basis of insurance contracts, and who are always recruited from the ranks of lawyers; true progress is delayed by the friction caused by such annoyances and disagreeable incidents." Insurance Education, Henry Moir, "The Business of Insurance," Vol. I, p. 8. "To an intelligent grasp of the subject a certain amount of information concerning the science, the practice and the law is essential, * * * * * Thompson on Insurance, Foreword, iii.

⁴⁴ Pound, *Justice According to Law*, *Col. L. Review*, XIV, No. 2, p. 120.

⁴⁵ "The changing of law by statute seems to me like mending a garment with a patch; whereas law should grow by the life that is in it, not by the life that is outside of it." Woodrow Wilson, *Am. Bar Assn. Rep.*, XXXIX, page 6.

With the growing spirit of nationality, a product of the great events of our time, we may hope confidently for a new consistency and harmony in a branch of the law of the greatest practical value.

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NECESSITY FOR ARRAIGNMENT AND PLEA IN CRIMINAL CASES.

The trend of judicial decisions in this particular is an excellent illustration of the modern effort to get away from technicalities in the prosecution of crimes. The omission of arraignment and plea a few years ago was treated as a violation of a sacred rite, rendering a conviction void; today it is treated as a technical defect, to be brushed aside, if the defendant has actually been tried as though he had pleaded not guilty.

Arraignment consists in calling the defendant to the bar to plead. The manner and purposes of the arraignment are thus described in *Crain v. U. S.*¹:

"The arraignment of the prisoner," Lord Coke said, "is to take order that he appear, and for the certainty of the person to hold up his hand, and to plead a sufficient plea to the indictment or other record." Co. Litt. 263a.

According to Sir Matthew Hale, the arraignment consists of three parts, one of which, after the prisoner has been called to the bar, and informed of the charge against him, is the "demanding of him whether he is guilty or not guilty; and if he pleads not guilty, the clerk joins issue with him *cul prit*, and enters the prisoner's plea; then he demands how he will be tried, the common answer is by God and the country, and thereupon the clerk enters *pro se* and prays to God to send him a good deliverance." 2 Hale, P. C. 219. So, in Blackstone: "To arraign is nothing else but to call the person to the bar of the court to answer the matter charged upon him in the indictment. . . . After which (after the indictment is read to the accused) it is to be demanded of him whether he is guilty of the crime whereof he stands indicted, or not guilty." 4 Bl. Com. 322, 323, 341. Chitty says: "The proper mode of stating the arraignment on the record is in this form, 'and being brought to the bar here in his own proper person, he is committed to the marshal,' etc. And being asked how he will acquit himself of the premises (in case of felony, and of high treason in case of treason) above laid to his charge, saith,' etc. If this statement be omitted, it seems the record will be erroneous." 1 Chitty, Crim. Law, 419.

A vivid description of the old fashioned arraignment is given in *Wood v. Oklahoma*.²

At common law it was absolutely essential that the defendant actually plead at the arraignment. Until he did so, he could not be tried. If the prisoner stood mute on a charge of treason, his act was treated as a confession, and he was forthwith sentenced. In lesser offenses the law concerned itself with forcing the defendant to plead. First a jury was sworn to determine whether the standing mute was due to act of God or obstinacy. If the latter, instead of simply entering a plea of not guilty and proceeding with the trial, pressure in a literal sense was put upon the defendant to extort a plea. The punishment

¹ 162 U. S. 637.

² 4 Okla. Cr. Rep. 436; 45 L. R. A. N. S. 673.

"hard and strong" was imposed until the defendant yielded or died. If the victim perished rather than yield, he saved his property for his heirs, because there was no corruption of blood or forfeiture without conviction.

Theoretically this barbarous procedure continued in England until a statute of 12th George III provided that under such circumstances the prisoner should be deemed convicted of the offense, and it was not until the act of 7 and 8 George IV, chapter 28, that Parliament hit upon the happy expedient of directing that a plea of not guilty be entered for the prisoner standing mute.

Generally in this country the same provision is made by statute. Sec. 1032 R. S. U. S. is a fair sample.

But suppose this step be overlooked in a given case; the defendant is not arraigned nor does he plead but is put upon trial and convicted. Suppose there was in fact both arraignment and plea, but the record or appeal fails to show it. What will the appellate court do when the omission is discovered?

In the early days there could be no doubt about the answer to these questions. It was held that the arraignment and plea were essential; that on appeal the record imported absolute verity and could not be contradicted; if it failed to show these essential steps, the appellate court was bound to hold that they were not taken, and to reverse the case and direct a new trial.

Rulings of this character were carried far. In a Massachusetts case there was an arraignment before a single judge; the defendant was tried and convicted before three judges. The statute provided that all indictments for capital offenses should be heard, tried and determined in the courts held by three or more justices. The case was reversed on the ground that the arraignment should have been before three judges, and to the objection that this was a quibble, the court remarked that if ever quibbling is justifiable certainly a man may quibble for his life.³

For years the cases were unanimous; the rule was applied universally.

Probably the first case to the contrary was *State v. Jerry* (a slave)⁴ decided in 1848, but it was not followed by the later decisions of that state.⁵ While here and there a few courts brushed aside these technical

³ *Com. v. Hardy*, 2 Mass. 303.

⁴ 3 La. Ann. 576.

⁵ *State v. Chenier*, 32 La. An. 103.

objections, there is no question but that as late as *Crain v. U. S.*⁶ decided in 1896, the vast majority of the decisions took the technical view.

In that case, in an elaborate opinion written by Mr. Justice Harlan, the Supreme Court, following the weight of authority, reversed a conviction simply because the record failed to show arraignment and plea. The court said that a plea was essential to determine the issue, and until a plea was entered there was nothing for the jury to try. The theory of the decision is contained in the following quotation from *Hopt v. Utah*,⁷ where the Supreme Court, after observing that the public has an interest in the life and liberty of an accused person said:

"Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods."

A vigorous dissenting opinion in the Crain Case, written by Mr. Justice Peckham, was concurred in by Mr. Justice Brewer and Mr. Justice White.

Within less than twenty years, in the case of *Garland v. Washington*,⁸ decided in 1914, the Supreme Court has overruled the Crain case, and has unanimously adopted the views in the dissenting opinion. Chief Justice White is the only member of the Court participating in the Crain case who has lived to see his dissenting view adopted as the law. Garland was convicted of larceny upon one information, to which he had duly pleaded; a new trial was granted, whereupon a second information covering the same facts was filed. He never pleaded to this, but was tried in all respects as though he had entered a formal plea of not guilty. The court said, in an opinion delivered by Mr. Justice Day:

"Technical objections of this character were undoubtedly given much more weight formerly than they are now. Such rulings originated in that period of English history when the punishment of offenses, even of a trivial character, was of a severe and often of a shocking nature. Under that system the courts were disposed to require that the technical forms and methods of procedure should be fully complied with. But with improved methods of procedure and greater privileges to the accused, any reason for such strict adherence to the mere formalities of trial would seem to have passed away, and we think that the better opinion, when applied to a situation such as now confronts us, was expressed in the dissenting opinion of Mr. Justice Peckham, speaking for the minority of the court in the Crain Case, when he said, (p. 649):

⁶ 162 U. S. 637.

⁷ 110 U. S. 574, 579.

⁸ 232 U. S. 642.

'Here the defendant could not have been injured by an inadvertence of that nature. He ought to be held to have waived that which, under the circumstances, would have been a wholly unimportant formality. A waiver ought to be conclusively implied where the parties had proceeded as if defendant had been duly arraigned, and a formal plea of not guilty had been interposed, and where there was no objection made on account of its absence until, as in this case, the record was brought to this court for review. It would be inconsistent with the due administration of justice to permit a defendant under such circumstances to lie by, say nothing as to such an objection, and then for the first time urge it in this court.'

"Holding this view, notwithstanding our reluctance to overrule former decisions of this court, we now are constrained to hold that the technical enforcement of formal rights in criminal procedure sustained in the Crain Case is no longer required in the prosecution of offenses under present systems of law, and so far as that case is not in accord with the views herein expressed, it is necessarily overruled."

While of course the Crain Case, so long as it stood, was controlling in the federal and territorial courts, and was persuasive in the state courts, many of the latter refused to follow it, but held that under such circumstances a defendant had waived his right to plead.

State v. O'Kelley,⁹ (Missouri) is a leading case. It was decided in 1914 just a few days after the decision of *Garland v. Washington*, but apparently without knowledge of that case. There was no arraignment or plea, but defendant's counsel at the opening of the trial said "No statement at this time except we plead not guilty." The majority of the court held that this statement constituted a waiver, but Justice Faris, in a very elaborate and interesting concurring opinion, preferred to put the waiver on the entire conduct of the defendant, rather than on this particular statement, which might never occur in another case.

In *Hack v. State*,¹⁰ decided in 1910, the record failed to show arraignment or plea. A number of early Wisconsin decisions had reversed convictions under such circumstances. The majority of the court overruled the old cases, and held that the time had come to apply common sense to such a situation. The case evidently gave considerable trouble to the court. There were seven judges, and four of them wrote opinions. There was a concurring opinion, a dissenting opinion, and finally, a dubitante opinion. The dubitante opinion is an excellent illustration of the attitude of some judges towards the precedents. After remarking that the cases overruled were old and numerous, and that such a violent revolution should come from the legislature, the learned justice concluded:

"These considerations make me doubt, hesitate, and refuse my assent. Again,

⁹ 52 L. R. A. N. S. 1063.

¹⁰ 141 Wis. 346, 45 L. R. A. N. S. 664.

with such slaughter of precedent there should go in justification of mitigation 'reasons of good regard.' Else this were a savage spectacle.

Now it may be that these precedents deserved this fate. They perhaps deserved death in order that we all might live. They were certainly guilty of being old. They were not innocent of having been born at the wrong time. They perhaps distracted the circuit judges in the consideration of fine scholastic distinctions concerning lack of ordinary care by intruding upon them some rude, practical experience in the exercise of ordinary care. Like primeval man before his fall, unconscious of sin, they neglected to cover themselves with foliage. They obtruded their classical clearness and simplicity against the turgid toploftiness which closed the nineteenth and began the twentieth century. They failed to stand for any corporate privilege or advantage. For all this they perhaps deserved amortization. But before oblivion's curtain falls upon them forever, let me say that in my youth, before professional success and competence and a seat on the supreme bench had their value impaired by realization, and while such things were bright with the glamour of anticipation, these precedents seemed to me authority, and clear, definite, and correct in their doctrine. Mentors of my brighter days, farewell!"

It is to be noted that none of these cases involved a capital offense. In their opinions the judges were careful to mention this fact; and to leave the question open as to capital crimes. While it is true that, generally, in capital cases, the courts are much more strict as to a defendant's waiver of his right, logically there is no ground for distinction. The rule adopted in the foregoing decisions should be followed in all classes of cases. In fact in one capital case, *State v. Straub*, 16 Wash. III, decided in 1896, this view was followed.

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APPEALS FROM THE SUPREME COURT TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA IN DISBARMENT PROCEEDINGS.

In view of the fact that the Court of Appeals of the District of Columbia in the case of *In Re Adriaans*,¹ reviewed, *on appeal*, the order of the Supreme Court of the District of Columbia disbarring an attorney of the lower court, and reversed that order of disbarment, it might be taken as beyond doubt that there is a right of appeal in such cases.

The attempt, however, will be made in this article to establish the proposition that the effect of said decision is not conclusive, but may be overruled should the right to appeal in such cases be asserted again. In this connection, decisions of other courts involving either appeals or writs of error are pertinent, because the distinction between appeals and writs of error is not preserved in our local practice.

The cases of *Ex Parte Burr*² and *Ex Parte Secombe*³ were both applications for *mandamus* to restore disbarred attorneys to the rolls of the lower Courts, and, therefore, not on the precise question of the right of review by *writ of error* or by *appeal*, but, nevertheless, Mr. Chief Justice Marshall and Mr. Chief Justice Taney, respectively, took occasion to say:

"No other tribunal can decide, in a case of removal from the bar, with the same means of information as the court itself. If there be a revising tribunal, which possess controlling authority, that tribunal will always feel the delicacy of interposing its authority, and would do so only in a plain case.

Some doubts are felt in this court respecting the extent of its authority as to the conduct of the circuit and district courts towards their officers;"

and

"It has been well settled by the rules and practice of the common law that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counselor, and for what cause he ought to be removed. * * * It is not necessary to inquire whether this decision of the Territorial Court can be reviewed here in any other form of proceeding."

Then, in the case of *Ex Parte Bradley*,⁴ although the Supreme Court of the United States granted a writ of mandamus to restore a disbarred attorney to the Bar of the Supreme Court of the District of Columbia, there was an express *dictum* to the effect that *an order of disbarment could not be reviewed by writ of error*, namely:

¹ 28 App. D. C. 515.

² 9 Wheat. 529.

³ 19 How. 9.

⁴ 7 Wall. 364.

"The order disbarring them (attorneys), or subjecting them to fine or imprisonment, is not reviewable by writ of error, it not being a judgment in the sense of the law for which this writ will lie. Without, therefore, the use of the writ of mandamus, however flagrant the wrong committed against these officers, they would be destitute of any redress."

And, again, in *Ex Parte Robinson*⁵ (not to be confused with *Ex Parte Robinson*,⁶ petition for mandamus), the attorney had been disbarred by a United States District Court, and then prosecuted an appeal to the Supreme Court; and, on the motion to advance the case, the Supreme Court said:

"Cases involving great hardship are frequently brought here for revision, and in such cases it is competent for the court to advance the same on motion. Still the motion must be denied, as it is well settled law that neither an appeal nor a writ of error will lie in such a case. Hence it was held in the case of *Ex Parte Bradley*, that *mandamus* from this Court to a subordinate Court was a proper remedy to restore an attorney-at-law, disbarred by such subordinate court. * * * *

"Whether the present case can be distinguished from the case cited will not now be decided, but the court is of opinion that the remedy of the party, if any, in this court, is not by appeal."

The words "will not now be decided" referred to the petition for mandamus on behalf of the same attorney; and, on the hearing thereon,⁷ the court ordered the writ of mandamus to issue.

Now, the statute in effect at the time of the *Bradley* case, *supra*, was the Act of Congress of March 3, 1863, Chap. 23, R. S. U. S., Relating to the D. C., secs. 750-850, and sec. 846 provided:

"Any final judgment, order, or decree of the Supreme Court of the District may be re-examined and reversed or affirmed in the Supreme Court of the United States upon writ of error or appeal, in the same cases and in like manner as provided by law in reference to the final judgments, orders, and decrees of the circuit courts of the United States."

And, the then section of the Revised Statutes of the United States, relating to writs of error or appeals from the Circuit Court of the United States, was as follows:

"Sec. 691. All final judgments of any circuit court, or of any district court acting as a circuit court, in civil actions * * * * * may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error."

And, in the *Bradley* case, it was held that the order of disbarment entered by the Supreme Court of the District was not a "judgment in the sense of the law for which this writ (of error) will lie."

Also, in the *Robinson* case, *supra*, the statute then in force was the above quoted section 691 of the R. S. U. S., and also the following section:

⁵ 19 Wall. 513.

⁶ 19 Wall. 505.

⁷ 19 Wall. 503.

"Sec. 636. A circuit court may affirm, modify, or reverse any judgment, decree, or order of a district court brought before it for review, or may direct such judgment, decree, or order to be rendered, or such further proceedings had by the district court, as the justice of the case may require."

And yet the Court held: "It is well settled law that neither an appeal nor a writ of error will lie in such a case" (from order of disbarment entered by the District Court.)

There does not seem to be any decisions, or *dicta*, in the reports of the Supreme Court of the United States, bearing directly on the precise question here under discussion, since the Robinson case, *supra*, was decided in 1873. Since then the Court of Appeals of the District was established by Act of Congress in 1893, and section 7 of that Act provided:

"That any party aggrieved by any final order, judgment or decree of the Supreme Court of the District of Columbia, or of any justice thereof, may appeal therefrom to the Court of Appeals hereby created; and upon such appeal the Court of Appeals shall review such order, judgment, or decree, and affirm, reverse, or modify the same as shall be just. * * * *"

this Act of 1893 being practically the same, for the purpose of this argument, as the statutes in the Bradley and Robinson cases, *supra*.

From the time of the establishment of the Court of Appeals there appear to have been only two cases (eliminating disbarments from practice before the Government Departments, and Juvenile Court) of disbarment before that Court, both in reference to the same attorney.

In the first of said two cases, *In Re Adriaans*,^a the proceeding was instituted originally in the Court of Appeals to disbar the attorney from practice before that Court, and he was so disbarred. In delivering the opinion of the Court, Mr. Chief Justice Alvey said:

"If the respondent should feel himself aggrieved by this judgment, and suppose that any fundamental right of his has been impaired or violated thereby, we are glad to know that he has a recourse for the correction of any error, if error there be, by an application to the Supreme Court of the United States. *Ex Parte Bradley*, 7 Wall. 364; *Ex Parte Robinson*, 19 Wall 505; *Ex Parte Wall*, 107 U. S. 265."

It will be noted that Mr. Chief Justice Alvey did not specify, in terms, the exact form of the "application" that the respondent might make to the Supreme Court of the United States. That he intended his language to mean an "application" for *mandamus*, and not by way of appeal or writ of error, would seem to be clearly evidenced by the use of term "application" instead of saying "by appeal or writ of error," and also by his express reference to the three decisions of the Supreme Court, cited by him, which were all *mandamus* cases, and the first two of

^a 17 App. D. C. 39.

which hold, as hereinbefore quoted, that appeal and writ of error do not lie in such a case, but that mandamus is the proper remedy in a proper case.

Therefore, in view of said decisions of the Supreme Court, and of said *dictum* in the first Adriaans case, *supra*, it seemed to be settled law in this jurisdiction that an order of disbarment of the Supreme Court of the District could not be reviewed *on appeal* by the Court of Appeals, but that mandamus was the only remedy, until the second Adriaans case,⁹ which was an appeal from an order of the Supreme Court of the District disbarring appellant, and in which case the appellate court reversed the lower court.

It cannot be successfully contended that the enactment of the D. C. Code, which went into effect in the period of time between the two Adriaans cases, enlarged the statutory right of appeal in disbarment cases, because section 226 of the Code is but practically a re-enactment of section 7 of the Act of 1893. Therefore, all statutes with respect to the right of appeal or writ of error were substantially the same in the Bradley case, Robinson case, first Adriaans case and second Adriaans case.

In the last cited case, it did not seem to be very seriously contended, or considered, that there was no right of appeal in that case. It is true that the able brief on behalf of appellant relied on section 226 of the Code, as giving him the right of appeal, on the ground that :

"The order appealed from in this case is a final order, by which the appellant is deprived of a valuable property right."

and recited many cases purporting to support appellant's contention, but the fact that it was evidently thought necessary to advance the contention, and cite authorities in support thereof, would seem to indicate that the question was at least debatable. And, the brief in opposition to the appeal devoted about six lines in all to making the objection that the appellate court was without jurisdiction to entertain the appeal; it contained no quotation from the Bradley case, *supra*, and not even a citation to the Robinson case, *supra*, nor to the *dictum* of Mr. Chief Justice Alvey in the first Adriaans case, and was mainly a review of the testimony in the case.

The only language in the opinion of the Court, delivered by Mr. Justice McComas, bearing on the point, was :

"We omit many questions urged by the respondent's counsel, because we

⁹ 28 App. D. C. 515.

deem discussion of them unnecessary. We do not doubt the respondent's right of appeal in this case."

Mr. Justice McComas then proceeded to review the proof adduced below and held that it was "legally insufficient to disbar" the respondent, and, therefore, reversed the order of disbarment.

Now, bearing in mind that the ground relied upon in appellant's brief (second Adriaans case), as giving him the right of appeal, was that the right to practice law is a "valuable property right," the language of the Court in *Re Thatcher*,¹⁰ decided in 1911, is most significant. That case contains a very exhaustive review of disbarment decisions, both Federal and State, including the United States reports cited above, and distinctly and expressly, in a well-reasoned opinion, disposes of the fallacious assumption of appellant in the second Adriaans case, *supra*, upon which the right of appeal was predicated therein, viz: the right to practice law is a "property right," by saying:

"We wholly disagree with respondent that the right to practice law is a property right.

* * * * *

"Admission to and continuance at the bar of the federal courts are not the subject of statutory regulations, and are governed wholly by rules which the several courts adopt and enforce in the exercise of powers inherent in their construction. * * * * Undoubtedly, therefore, under this authority, which stands unquestioned in the federal practice, respondent's status is to be decided solely by the application of the facts to the rules of this court respecting admission and exclusion.

* * * * *

"The language of Chief Justice Marshall in *Ex Parte Burr*, 9 Wheat. 529, uttered 80 years ago, is the present law on the subject, and protects both attorney and court. * * * * The Court uttering those words surely did not consider that it was dealing with a property right. Except where some constitutional or statutory provision intervenes, all reported attempts to review judgments of disbarment are found to have encountered this same theory of the status of the practice of the law as a privilege, in distinction to an absolute right."

From the language of this opinion but one fair conclusion can be drawn as to the rule of the Federal Courts in regard to the right of appeal in disbarment cases—that such an appeal or writ of error does not lie. Moreover, in considering the effect of the opinion just quoted, it should be always borne in mind, as previously stated, that our local statute on the subject is practically the same as the Federal statute, and that in cases of similar statutes the Federal decisions are controlling authority in our local Courts.

Further, the force of the last quoted opinion and of the decisions of the Supreme Court, *supra*, is not lessened because of the statutory provisions of section 65 of the D. C. Code, that the Supreme Court of

^{*} 190 Fed. 969.

the District, in general term, "may admit persons to the bar of said court and dismiss them." This section is but legislative recognition of the court's inherent power to disbar, which power is, as was said in *Ex Parte Burr*, *supra*, "incidental to all courts;" and in *Ex Parte Bradley*,¹¹ "this power has been recognized and enforced ever since the organization of courts, and the admission of attorneys to practice therein."

Also, it would seem that sections 219 and 220 of our Code should not be construed as specifying statutory grounds for disbarment because the court previously to their enactment had inherent power to disbar on the facts set forth in said two sections. It was said of section 219, in *Diggs v. Thurston*,¹² that it is "at least as broad as the rule of the common law." Rather section 219 should be taken as providing an expeditious and simple method of suspending or disbarring an attorney in the *same* case in which he was derelict in his duty, instead of resorting to the formal formulation of charges for disbarment, and regular hearing thereon by the Court in general term. And section 220, it would seem, is intended rather as a rule of evidence—for providing a simple expeditious manner of proving the charge in disbarment proceeding in a proper case, by dispensing with the necessity of a hearing anew on the facts of the alleged offense and making the record of the prior conviction thereof the only proof required.

The fact that, while the Code provides in section 65 that the court may dismiss members of its bar, and in sections 219 and 220 provides for the above stated summary procedure and proof, without providing *in specific terms* in those or any other sections for the right of appeal from an order of disbarment, would seem to add cogency to the argument that such right of appeal does not exist.

It is true that in some jurisdictions there are decisions holding that there is the right of appeal, or writ of error, from an order of disbarment, but, upon analysis, it will be discovered that many of those State decisions are based upon State statutes expressly giving the disbarred attorney the right of appeal in express words; that is, the State statute, in addition to the general section giving right of appeal from final judgments, etc. (similar to sec. 226 of the D. C. Code), also contains *another section expressly providing, in terms, that in disbarment proceedings the disbarred attorney has the right of appeal*. Hence, the argument, that in other jurisdictions it has been held that there is the right of ap-

¹¹ 7 Wall. 364.

¹² 39 App. D. C. 267.

peal in such cases, turns against itself, because many of those States have deemed it necessary to give that right of appeal by express and precise phraseology.

It might be suggested that the case of *Cobb v. United States*,¹³ in which the United States Circuit Court of Appeals reviewed and affirmed, on writ of error, a judgment of suspension made by the District Court of Alaska, is Federal authority for the contention that a writ of error lies in disbarment cases.

However, an examination of that case discloses that no objection to the appellate court reviewing the case was ever made, and that the proceeding was conducted under the specific provisions of sections 743-752 of the Alaska Code relating to suspension and disbarment of attorneys.

The case of *Barnes v. Lyons*, 187 Fed. 881, also arose in Alaska under said Code. It came to the Circuit Court of Appeals on petition for mandamus to restore a disbarred attorney to the roll, and the Court, in refusing mandamus, said:

"Beyond the reasons discussed for denying the writ, it is not clear that the petitioner was without a remedy by writ of error from the original proceeding. Such a writ was prosecuted to this court in *Cobb v. United States*, 172 Fed. 641. But the point was not made in that case."

The correct Federal rule would seem to be as stated in the later case of *Re Thatcher*, *supra*, and the decision of the Supreme Court, *supra*.

If it should be said, in opposition to the contention advanced in this article, that 2 CYC 595 says that "An appeal will lie from an order suspending or disbarring an attorney," and that the footnote thereto refers to cases from sixteen different States, the reply can be made that an analysis of *all* those cases, and also of *all* the cases cited in 2 Century Digest, sec. 625, and also of some additional State cases, shows the following:

That the cases from Illinois and Iowa are not in point;

That the objection was practically waived in the Kentucky, Connecticut and Wisconsin cases;

That in the cases from Arkansas, Indiana, South Dakota, Oklahoma, and Texas, there was either a separate statute, or separate section of a statute, relating to disbarment of attorneys and procedure therein, and giving the disbarred attorney in express words the right of appeal or writ of error; that is, those cases do not hold that a disbarred attorney

¹³ 172 Fed. 641.

has the right of appeal by virtue of a statute relating to appeals in general similar to sec. 226 of our Code, but the State statutes give the right in specific terms in a statute relating to disbarment proceedings;

That the Missouri case would seem to be contrary doctrine, from a *dictum*, but assigns no reason therefor;

That the Massachusetts cases would seem to be contrary doctrine, but only so far as to "matter of law" apparent on the record;

That the Illinois, New York and Tennessee cases would seem to be contrary doctrine, but base the right of appeal on a previous ruling that the right to practice law is a "substantial right," which ruling is directly contrary to the Federal ruling as expressed in *Re Thatcher, supra*. Also, that the New York cases predicate their decisions on a ruling that a disbarment proceeding is a "special proceeding," and that the State statute provided for the right of appeal from "a final order affecting a substantial right made in a special proceeding," and that this right of appeal from a "special proceeding" was provided for in a separate section in addition to the section giving the right of appeal from an "ordinary action" and that the Wisconsin case mainly relied on the New York cases, and also the Wisconsin statute gave the right of appeal in a "special proceeding";

That the Connecticut, North Carolina and Pennsylvania cases, squarely hold that an order of disbarment is not appealable.

Therefore, it would seem as though the great weight of the State authorities is to the effect that, under a statute similar to our local statute, there is no right of appeal or writ of error from an order of disbarment; and, that such is the Federal rule has also been previously herein established.

Since the Supreme Court and Court of Appeals of the District are Federal Courts, surely it cannot be successfully maintained that Congress by the enactment of the Court of Appeals Act of 1893, and of section 226 of the Code (providing that "*any* final order, judgment, or decree" of the Supreme Court may be reviewed by the Court of Appeals, on appeal), intended those statutes to confer the right of appeal upon an attorney stricken from the rolls of the lower court, when we recall that Congress at the time of legislating had before it the knowledge that, under similar Federal statutory provisions, an order of disbarment had been previously held by the Supreme Court of the United States. (*Ex Parte Bradley*, and other cases, *supra*) as "not reviewable by writ of

error, it not being a judgment in the sense of the law for which this writ will lie."

Therefore, it would seem as though the effect of the decision in the second *Adriaans* case, *supra*, would probably be overruled in any subsequent disbarment proceeding, if the question of the want of jurisdiction in the Court of Appeals, to review on appeal disbarment orders, could be presented to the Supreme Court of the United States.

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THE LIMITS OF OWNERSHIP UNDER PATENT RIGHTS.

"It is obvious that the conclusions arrived at in this opinion are such that the decision in *Henry v. Dick Co.*¹ must be regarded as overruled." In these words the Supreme Court of the United States in *Motion Picture Patents Company v. Universal Film Manufacturing Company, et al.*, decided April 9, 1917, has effectively set aside its former interpretation of the patent laws defining the right of exclusive use granted by letters patent for inventions.

Section 4884 R. S. provides that every patent shall contain a grant "of the exclusive right to make, use and vend the invention or discovery throughout the United States and the territories thereof" for a period of seventeen years. No rights are given the patentee whereby he may make, vend or use the subject of his patent. He may make or use or vend any article he may choose without statutory sanction so long as he does not trespass upon rights granted another. The patent franchise is one of exclusion—the privilege of barring others from making, using or vending any article covered by the patent. Under a long line of earlier interpretations of the statute the owner of a patent had absolute freedom in disposing of the rights secured to him and it was recognized that he might dispose of his rights according to his pleasure, and regard an infraction of the conditions or disposition an infringement of his patent privilege. If he was a manufacturer of the patented article, it was clearly within his power to vend such article upon whatsoever terms or conditions as to resale or use he might impose. The Supreme Court in *Bement v. National Harrow Co.*,² referring to the rights secured under the patent laws, stated that "the very object of these laws is monopoly and the rule is with few exceptions that any conditions, which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts."

Fortified by such interpretations of the grant secured by letters patent as that in the Button Fastener Case³ and other decisions of the Circuit Courts of Appeals, upholding the patentee's right to control the sale and use of the patented article, manufacturers found it to their

¹ 224 U. S. 1.

² 186 U. S. 70.

³ 77 Fed. Rep. 288.

advantage to dispose of some one or all of the exclusive rights granted them under letters patent upon terms and conditions regulating the resale of the patented article or the use of that article after a sale.

Later day decisions relating to this subject, which are of particular interest to manufacturers and the patent profession, include the "Mimeograph," "Sanatogen" and the recently decided "Motion Picture" cases.

In *Henry v. Dick Co.*,⁴ the "Mimeograph" case, the plaintiff was the owner of two letters patent covering a stencil-duplicating machine known to the trade as the "Rotary Mimeograph." This machine was manufactured by the plaintiff and sold with notice, attached to the machine, that it "may be used only with the stencil paper, ink and other supplies made by A. B. Dick Company, Chicago, U. S. A." The defendant, Henry, sold ink to the purchaser of the machine adapted to be used with the mimeograph with knowledge of the license agreement and with full expectation that the ink would be used with the machine. The case was before the Supreme Court on a certificate from the Circuit Court of Appeals for the Second Circuit, that court asking instruction on the question, "Did the acts of the defendants constitute contributory infringement of the complainant's patents?" Mr. Justice Lurton delivered the majority opinion of the Court, answering the question in the affirmative. In its opinion the Court made clear that "the property right to a patented machine may pass to a purchaser with no right of use, or with only the right to use in a specified way, or at a specified place, or for a specified purpose." In a dissenting opinion Mr. Chief Justice White contended that the sale of the mimeograph completely removed it from the monopoly created by the patent, and while he recognized the right in the owner to dispose of the machine on such conditions in the nature of covenants as to use as were not contrary to public policy, yet he maintained that this right of conditional use was not a "right derived from or protected by the patent law, but was a mere right arising from the ownership of property."

The "Sanatogen" case (*Bauer v. O'Donnell*, 229 U. S. 1) was before the Supreme Court on a certificate from the Court of Appeals of the District of Columbia. Sanatogen, a food composition, was sold by the sole licensee under the patent with a license restriction that the package "is licensed for sale and use at a price not less than one dollar (\$1.00)." The license notice further provided that any sale in violation of the conditions would constitute an infringement of certain letters patent.

⁴ 224 U. S., 1.

The infringement complained of by Bauer was the resale of packages of Sanatogen, purchased from jobbers, at less than the price stipulated in the notice attached to each package. The question before the Supreme Court was, "Did the acts of the appellee (defendant) in retailing at less than the price fixed in said notice, original packages of 'Sanatogen' * * * constitute infringement of appellant's (plaintiff's) patent?" The question propounded by the Court of Appeals was answered in the negative by a Bench divided five to four. It is to be noted that this case differs from the Dick case in that the latter was one concerning the *use* of a patented article while the "Sanatogen" case dealt with the right to *vend* a patented article. The Court says:

"The jobber from whom the appellee purchased had previously bought, at a price which must be deemed to have been satisfactory, the packages of Sanatogen afterwards sold to the appellee. The patentee had no interest in the proceeds of the subsequent sales, no right to any royalty thereon, or to participation in the profits thereof. The packages were sold with as full and complete title as any article could have when sold in the open market, excepting only the attempt to limit the sale or use when sold for not less than one dollar. In other words, the title transferred was full and complete with an attempt to reserve the right to fix the price at which subsequent sales could be made. There is no showing of a qualified sale for less than value for limited use with other articles only, as was shown in the Dick case. There was no transfer of a limited right to use this invention, and to call the sale a license to use is a mere play upon words."

It was the view of the Court that the sale of the article had carried it outside the limit of the patent monopoly.

The case which occasions this comment, *Motion Picture v. Universal Co., et al.* (October Term, 1916), was a suit for infringement of letters patent for Projecting-Kinetoscopes, the patent covering part of the mechanism in picture projecting apparatus for feeding a film through the machine with a regular, uniform and accurate movement in such manner as to not expose the film to excessive strain or wear. The machine was sold with the following notice:

"The sale and purchase of this machine gives only the right to use it solely with moving pictures containing the invention of reissued patent No. 12192, leased by a licensee of the Motion Picture Patents Company, the owner of the above patents and reissued patent, while it owns said patents, and upon other terms to be fixed by the Motion Picture Patents Company and complied with by the user while it is in use and while the Motion Picture Patents Company owns said patents. The removal or defacement of this plate terminates the right to use this machine."

The Circuit Court of Appeals affirmed the decree of the lower court dismissing the bill and held that the notice attached to the machines and which attempted to impose conditions as to its use with certain films was illegal and within the inhibitions of the Clayton Act (C. 323, Sec. 3, 38 Stat. 731), the testimony in the case showing that the plain-

tiff had a monopoly under its patents for projecting machines so that if no films not manufactured by the plaintiff can be used upon these machines it will obtain an absolute monopoly of the film business.

The Supreme Court notices that the state of facts presents two questions for decision, namely :

"May a patentee or his assignee license another to manufacture and sell a patented machine and by a mere notice attached to it limit its use by the purchaser or by the purchaser's lessee, to films which are no part of the patented machine, and which are not patented?"

and

"May the assignee of a patent, which has licensed another to make and sell the machine covered by it, by a mere notice attached to such machine, limit the use of it by the purchaser or by the purchaser's lessee to terms not stated in the notices but which are to be fixed, after sale, by such assignee in its discretion?"

Each of these questions the Court answers in the negative.

It is plain to the Court that the statute and established rules restrict the patent granted on a machine to the mechanism described and claimed in the patent as necessary to produce the results which the inventor set out to obtain, and that the patent is not concerned with and has naught to do with materials with which or on which the machine is adapted to operate. The Court says :

"The grant is of the exclusive right to use the mechanism to produce the result with any appropriate material, and the materials with which the machine is operated are no part of the patented machine or of the combination which produces the practical result. The difference is clear and vital between the exclusive right to use the machine which the law gives to the inventor and the right to use it exclusively with prescribed materials to which such a license notice as we have here seeks to restrict it. The restrictions of the law relate to the useful and novel features of the machine which are described in the claims of the patent, they have nothing to do with the materials used in the operation of the machine ; while the notice restrictions have nothing to do with the invention which is patented but relate wholly to the materials to be used with it. Both in form and in substance the notice attempts a restriction upon the use of the supplies only and it cannot with any regard to propriety in the use of language be termed a restriction upon the use of the machine itself."

The decision in the Motion Picture case, which is a direct reversal of the Dick case as to the right of a patentee to restrict the use of his patented machine, brings in harmony the decisions of the Supreme Court with reference to a patentee's rights as to use and sale of his invention, the "Sanatogen" case making plain that there was no right to control the resale of the patented article after the patentee or his licensee had obtained the purchase price asked for the patented article, and the Motion Picture case indicating "that it is not competent for the owner of a patent by notice attached to its machine to, in effect, extend the scope of its patent monopoly by restricting the use of it to materials necessary in its operation, but which are no part of the

patented invention." The Court is clearly of the opinion that "The patent law furnishes no warrant for such a practice and the cost, inconvenience and annoyance to the public, which the opposite conclusion would occasion, forbid it."

Confirmation of its announced conclusions is found by the Court in the enactment by Congress of the so-called Clayton Act, which declares it unlawful to lease or sell goods, machinery or supplies on a condition that the lessee or purchaser shall not use or deal in the goods, machinery or supplies of a competitor of the lessor or seller when such condition may substantially lessen competition and create a monopoly. This act was passed subsequent to the decisions in the Dick and Sana-togen cases, but even had it been on the statute books at the date of the decision in the Dick case it is not believed that that case would have come within the terms of the act since it did not appear that the restriction placed on the use of the mimeograph in any way created a monopoly in the sale of mimeograph ink.

A restriction such as the Motion Pictures Company sought to enforce under the patent laws is characterized as "a potential power for evil over an industry which must be recognized as an important element in the amusement life of the nation" and is declared plainly void "because wholly without the scope and purpose of our patent laws and because, if sustained, it would be gravely injurious to that public interest, which we have seen is more a favorite of the law than is the promotion of private fortunes."

Mr. Justice Holmes in dissenting from the majority decision in the Motion Picture case states that it is undisputed that a patentee has the right under his patent to forbid the rest of the world from making it and he may keep it wholly out of use, and he can see

"no predominant public interest to prevent a patented tea pot or film feeder from being kept from the public, because, as I have said, the patentee may keep them tied up at will while his patent lasts. Neither is there any such interest to prevent the purchase of the tea or films, that is made the condition of the use of the machine. The supposed contravention of public interest sometimes is stated as an attempt to extend the patent law to unpatented articles, which of course it is not, and more accurately as a possible domination to be established by such means. But the domination is one only to the extent of the desire for the tea pot or film feeder, and if the owner prefers to keep the pot or the feeder unless you will buy his tea or films, I cannot see in allowing him the right to do so anything more than an ordinary incident of ownership."

The patent profession is as far as it ever was from having any settled doctrine regarding the substantive rights under letters patents for inventions.

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Drilling was taken up at the Law School April 2, 1917, when Major E. V. Bookmiller, U. S. A., was designated by the War Department to take charge of the work. A meeting of students was held at which Dean Hamilton presided. Dean Hamilton and Chief Justice J. Harry Covington urged the students to take up military instruction at once; Major Bookmiller outlined the course of military instruction he planned to give. It was found that nearly ten per cent. of the student body had had military instruction at military schools, in the National Guard or at Plattsburg. These students were appointed drill masters, and were given a short preliminary course under Major Bookmiller to prepare them for the work of instructing their classmates in the fundamentals of the School of the Soldier and the School of the Squad. The first drills were held indoors, in one of the large classrooms. Permission has been obtained to drill on the grounds of Judiciary Square, where the Court of Appeals buildings and the building occupied by the Supreme Court of the District are located. These grounds are within

one hundred yards of the law school building, cover several acres in extent and are well adapted for the purpose. On the occasion of the first company drill an eloquent address was delivered to the Georgetown students by Senator Harding, of Ohio.

It is interesting to note that military instruction was begun for the first time in the history of Georgetown almost seventy years ago to the day, the first cadet company of Georgetown men having been organized April, 1849.

NOTES.

PASSENGER OF COMMON CARRIER.—In a recent Massachusetts case the court had presented to it for consideration the interesting question, when a person is to be deemed a passenger on a street railway car. The plaintiff was a passenger on one of the defendant's cars in Watertown, intending to go to Newton. This car, known as the Watertown car, went no farther than the car barn, and it became necessary for the plaintiff to change there in order to enter the Newton car which was about three car lengths farther on in a direct line. While the plaintiff was walking in the direction of the Newton car, the Watertown car having started, struck her as it rounded the curve to enter the barn. In her declaration the plaintiff alleged that while transferring from the Watertown to the Newton car, she was a passenger. The presiding judge left it to the jury to decide whether, on the facts shown, she was a passenger. The defendant excepted to this instruction of the judge, which exception was sustained on appeal. (*Niles v. Boston Elevated Ry. Co.*¹)

The determination of the question, when the relation of carrier and passenger begins and when that relation ceases, is of especial importance in connection with the degree of care that the carrier will be held to exercise. A carrier owes a higher degree of care to a passenger than it owes toward one not a passenger. A carrier is not, however, an insurer of the safety of its passengers, but is responsible for the exercise of the highest degree of care consistent with the reasonable conduct of its business.² Care may be defined as the doing of what a reasonably prudent man would do in like circumstances. Although carriers as a general rule must exercise extraordinary care toward their passengers, yet that extraordinary diligence is no more than an ordinary requirement in extreme situations and conditions. In all cases the amount of care bestowed must be equal to the emergency, however the standard be denominated.³

In this connection the question has arisen whether carriers are held to the exercise of the same high degree of care for the safety of passengers at stations, as for their safety during transportation. Some courts have declared in favor of the extreme view that carriers must

¹ 114 N. E. 730. (Massachusetts, January 10, 1917.)

² *Tompkins v. Boston Elevated Ry. Co.*, 201 Mass. 114; *Duchemin v. Boston Elevated Ry. Co.*, 186 Mass. 353.

³ *Bacon v. Casco Bay S. B. Co.*, 90 Me. 46; 37 Atl. 328

exercise extraordinary diligence in the care and safety of their passengers at all times,⁴ while the majority of cases recognize the more liberal view that a distinction should be made between the care due a passenger while on the station grounds of the carrier and while in actual transportation on the cars of the company.⁵ The latter is no doubt the better rule from the point of reason and justice to all parties concerned. It is clear that a very high degree of vigilance, foresight, and skill is required to fill the measure of care in the transportation of passengers, whereas the requirement of care for the safety of passengers on platforms and other parts of the station premises is satisfied by the exercise of a lesser degree of skill and foresight. Thus, in *Falls v. San Francisco & N. P. R. Co.*⁶ the court stated that the higher degree of care is exacted only during the time in which the passenger has given himself wholly in charge of the carrier; that is, while on the train, or getting on or off, for then only is the passenger subjected to the peculiar hazards of that mode of travel, against which the carrier must exercise the highest degree of skill and care.

In connection with the measure of care to be exercised by the common carrier it becomes important to know definitely who is a passenger. In other words, when does a person who has started to take a passage on a train or street car become a passenger, and how long does that status continue? Must one have purchased a ticket or deposited his fare with the conductor before he is entitled to the privileges and care of a passenger? Undoubtedly the relation of passenger and carrier commences when the traveler goes into the carrier's premises and purchases a ticket for the purpose of taking a train, the carrier assuming the duty of reasonable care for the protection of his person while proceeding to take the train.⁷ The weight of opinion seems to be that a person may sometimes be a passenger when attempting to take a train, although he has not yet boarded the cars or even procured a ticket. In *Grimes v. Pa. Co.*⁸ it was held that one who, in good faith, goes to a depot at a reasonable hour to take a train is a passenger entitled to pro-

⁴ *Knight v. Portland S. & P. R. Co.*, 56 Me. 234; *Fremont E. & M. Valley R. Co. v. Hagblad*, 72 Neb. 774, 4 L. R. A. (N. S.) 254; *Louisville, N. A. & C. R. v. Lucas*, 119 Ind. 583, 6 L. R. A. 193.

⁵ *McCormick v. Detroit, G. H. & M. R. Co.*, 141 Mich. 17, 104 N. W. 390; *Moreland v. Boston & P. R. C.*, 141 Mass. 31; *St. Louis, I. M. & S. R. Co., v. Woods, Ark.*, 33 L. R. A. 855; *Maxfield v. Maine C. R. Co.*, 100 Me. 79, 60 Atl. 710.

⁶ 97 Cal. 114, 31 Pac. 901.

⁷ *Lent v. New York Cent. & H. R. R. Co.*, 120 N. Y. 467.

⁸ 36 Fed. Rep. 72.

tection against unsafe platforms, as in case of the absence of a light, although he has not yet purchased a ticket. With respect to street railways the law seems to be well settled that as soon as the party takes hold of the car and attempts to board it, in an orderly way, he is entitled to all the rights of a passenger. It would be unreasonable to assume that one entering a street car is to be regarded as a trespasser until a contract has been entered into with the conductor, based upon the payment of the required fare.⁹

It must be borne in mind, however, in this connection, that in order to be regarded as a passenger, one must present himself in a proper place and in a proper manner, because one is not presumed to have the invitation to present himself in any other way. This point is illustrated clearly in *Baltimore Traction Company v. State*,¹⁰ where one who attempted to board a street car going six miles an hour, and had signaled for it to stop, was held to be not a passenger. In *Webster v. Fitchburg R. Co.*,¹¹ the plaintiff was running from the direction of a public street across the premises outside the station to catch a train about to start, and, while crossing a track, was struck by an incoming train. In holding that the plaintiff was not a passenger at the time of accident, the court stated that he (plaintiff) at no time presented himself in a proper way to be taken as a passenger, having been all the time running rapidly, without precautions for his safety, towards a point directly in front of an incoming train.

In *Duchemin v. Boston Elevated Ry.*,¹² the plaintiff was injured by the fall of a trolley pole and car sign as he was about to enter the street car of the defendant. The question presented to the court was whether the jury should have been instructed that the defendant owed to the plaintiff the same high degree of care while he was approaching the car, and had not yet reached it, that it would owe to a passenger. It is apparent that a person in such a situation is not in fact a passenger. He has not entered upon the premises of a carrier, but is on a public highway where he has a clear right to be, independently of his intention to become a passenger. He may change his mind at the last moment and not become a passenger. Certainly the carrier owes him no other duty to keep the street clear of obstructions to his progress than it owes to all other travelers on the highway. The liability of the defendant company was therefore held not to be determined by the application of

⁹ *Butler v. Glens Falls S. H. & Ft. E. St. R. Co.*, 121 N. Y. 112.

¹⁰ 78 Md. 409.

¹¹ 161 Mass. 298, 24 L. R. A. 521.

¹² 186 Mass. 353, 66 L. R. A. 980.

the rule governing the relation of carrier and passenger. However, if the plaintiff in this case had actually taken hold of the car in the attempt to enter it,¹³ when he was injured, he would unquestionably have been considered a passenger.

With respect to the termination of the relation of passenger and carrier, it may be said that a passenger on a street car does not cease to be such by momentarily stepping to the ground to enable other passengers to leave the car.¹⁴ Especially during the rush hours is one obliged to stand on the platform of a crowded street car, and under such circumstances he cannot be said to have ceased to be a passenger while temporarily stepping from the car to the street to allow passengers from the interior of the car to alight. In *Wakeley v. Boston Elevated Railway Co.*,¹⁵ the plaintiff was held to have been a passenger when she was injured while alighting from a street railway car, by reason of stepping into a depression. The contract of carriage places a duty on the carrier to provide a reasonably safe place for its passengers to alight,¹⁶ and furthermore, the relation of passenger and carrier continues until the passenger not only has alighted from the train or car, but also has left the premises by the means provided.¹⁷

In the principal case, *Niles v. Boston Elevated Ry. Co.*, *supra*, the plaintiff when injured, was not on the defendant's premises, nor at a station or platform within the control of the carrier, in use for the purpose of transferring passengers. Neither was she under its direction or within its care, but upon a public highway, free to choose her own way while transferring from one car to another, and as a matter of law was not therefore a passenger. The defendant company was, of course, liable to plaintiff if it was guilty of negligence, but not for that high degree of care required of a carrier towards its passengers.

J. M. M.

RIGHT OF INMATES OF AN ORPHANS' HOME TO ATTEND SCHOOL.—In the case of *Ashley v. Board of Education*,¹ which arose in a state having in force a statute requiring the board of education to establish a sufficient number of free schools for the accommodation of all persons in the district of school age, the question as to the right of inmates

¹³ *Davey v. Greenfield & T. F. St. R. Co.*, 117 Mass. 106.

¹⁴ *Tompkins v. Boston Elevated Ry. Co.*, 201 Mass. 114.

¹⁵ 217 Mass. 488.

¹⁶ *Beaden v. St. Louis & S. F. R. Co.*, 215 Mo. 105, 114 S. W. 961.

¹⁷ *Louisville & N. R. Co. v. Johnson*, 182 S. W. 214, 168 Ky. 351.

¹ 114 N. E. 20. (Illinois, decided October 24, 1916.)

of an orphans' home to attend school without charge was presented to the court for determination.

The appellees insisted that only residents of the school district were entitled to the benefit of the schools without the payment of tuition; that the appellants were minors, who could not voluntarily change their place of residence, and that their legal residence and domicile was the place where their parents resided. The appellants contended that they were bona fide residents of the district and entitled, under the law, to attend the public schools.

As a general rule, the free school privileges of a district, town or city are open only to children, otherwise eligible, who are bona fide residents of that district, town or city;³ and in determining whether a person is or is not a resident in a school district within the meaning of such a rule, the usual and ordinary indicia of residence or the absence thereof, should be the proper guide, and not the secret mental resolves or concealed intentions of persons living or having lived, in the district.³ Such rule, however, does not usually require that there shall be a legal domicile; but it is sufficient if the child and his parent, or the person in control of him, are actually resident in the district, with apparently no present purpose of removal.⁴

Although there is some conflict among the decisions as to what constitutes a residence which will entitle a child to school privileges, statutes providing for a free public school system are by the weight of authority construed as evidencing an intention on the part of the state that all the children within its borders shall enjoy the opportunity of a free education. In line with this construction of the statutes, residence entitling an infant to school privilege is distinguished from domicile, or the technical and narrow use of the term "residence" for the purpose of suffrage or other like purposes, and it is construed in a liberal sense as meaning to live in, or be an inhabitant of, a school district,⁵ the purpose being not to debar from school privileges any child of school age found within the district under the care, custody or control of a resident thereof.

As a general rule, the residence of parents is the residence of their children. Boarding children in a district does not, of itself, entitle

³ *Yale v. West Middle School Dist.*, 59 Conn. 489; 22 Atl. 295.

⁴ *State v. Smith*, 64 Mo. App. 313.

⁵ *Yale v. West Middle School Dist.*, 59 Conn. 489; 22 Atl. 295.

⁶ *Board of Education v. Lease*, 64 Ill. App. 60; *School Dist. No. 2 v. Pollard*, 55 N. H. 503.

them to the benefits of the free school in said district.⁶ The mere temporary residence of a family in a district, solely to enjoy the benefits of the free schools and with the intention of removal as soon as that purpose is accomplished, does not entitle the children to the privileges of said schools. The removal of a portion of a family from the legal domicile to another district in order to send to the free schools thereof does not confer the right to do so.⁷ As a general rule, the residence of their parents is the residence of employees; hence the privilege of the free schools in another district is not acquired by placing children temporarily at service in that district. This includes those who are placed in families to attend school and do chore work for their board, etc. The most liberal policy is, however, recommended toward this class of children. The state has as much interest in their education as in that of the more favored, and, although not legally eligible to attend free, the directors should permit them to do so when not inconsistent with the rights of others and the welfare of the school. Children who have been apprenticed or adopted into a new family, or who have been placed permanently in the care of others, with no intention of withdrawal, or those over whom parents have relinquished all control, from whatever cause, or those who have no parents or guardians, or whose parents or guardians live in another state or country and exercise no control over their children, or those who have no permanent abode, but go from place to place in search of employment, and whose only home is where they find work—the children included in all the above classes are to be enumerated in the district where they live, and are entitled to all the rights and benefits of the free schools in said district.⁸

In the case of poor persons it is frequently necessary, particularly when one of the parents is dead or disabled, or for any reason cannot or will not assist in the support of his family, that homes shall be found for the children in places other than those where the parents reside, and under such circumstances the child is entitled to be enumerated among the school children and to attend the school in the district in which he actually resides, as a matter of right, not dependent upon the payment of tuition by the school district in which the parents reside or the consent of the directors of that school district or of the directors of the district in which such child actually resides.

It has been said that "the state is interested to have all the children

⁶ *Haverhill v. Gale*, 103 Mass. 104.

⁷ *Gardner v. Fargo Board of Education*, 5 Dak. 259.

⁸ *Bateman's Common School Decisions* (Ed. of 1889), p. 135.

educated in order that they may become good citizens." Experience has demonstrated that it costs the public much more to support one ignorant or vicious person than to educate many children. On the simple ground of economy, the state cannot afford to permit any child to grow up without being sent to school. The school laws recognize this fact and their provisions are framed accordingly. If any child is actually dwelling in any school district, so that some person there has the care of it, and is within the school age, not incapable by reason of physical infirmity of attending school, and is not instructed elsewhere, then that child must go to the public school.⁹

Where a child, with the consent of her parents, goes to live in the family of another as a member of the family, under an agreement that it is to be her home and she is to be cared for and provided with school facilities, she becomes, under the arrangement, a bona fide resident of the district in which she lives.¹⁰

And a child whose parents have no established home acquires a residence in a school district, entitling him to school privileges, by making his home with a resident of the district and working for his board, although he came to the district for the purpose of attending that particular school.¹¹

So a child going to live with a relative under an arrangement by which she is to raise and educate her, and treat her in all respects as her own child, is a resident of the school district in which she resides with such relative.¹²

To establish a rule that a minor cannot have a residence for school purposes, other than that of his parents, would in many cases deprive him of all benefits of the schools. When a minor has poor parents, the poverty of the parents renders it absolutely necessary in many cases that a home for a minor should be found in places different from that of the parents, and if the rule was applied, such children, for whose benefit the free schools were especially instituted, would be deprived of all benefit of them.

So far as a rule can be deduced from the cases upon this subject it seems to be that a child is entitled to the benefits of the public schools in the district in which he lives, if he has gone there in good faith for

⁹ *Yale v. West Middle School Dist.*, 59 Conn. 489; 22 Atl. 295.

¹⁰ *Misner v. School District No. 11*, 96 N. W. 128.

¹¹ *State v. Thayer*, 74 Wis. 48; 41 N. W. 1014.

¹² *McNish v. State*, 74 Neb. 261; 104 N. W. 186.

the purpose of securing a home and not for the purpose of taking advantage of school privileges. But that it will not be permitted to go into a district chiefly for the purpose of getting school advantages.

In the case considered it was held that "every child of school age in the state is entitled to attend the public schools in the district in which it actually resides for the time being, whether that be the place of its legal domicile, or the legal domicile of its parents or guardians, or not."

F. C. V.

UNFAIR COMPETITION — FAMILY NAME AS TRADE MARK.—That there are sometimes occasions when the use of one's own family name in trade and business should be restricted and even prohibited is universally admitted. These occasions exist when the use of one's own name to designate a certain business or article of trade causes confusion in the mind of the purchasing public with regard to another article of the same or similar character designated by that name already upon the market, or with some established business under that name. Where such similarity or identity is not clearly explained so as to differentiate the new article from the old a fraud is committed upon the public and an injury done to the original trader. To try to compete for the custom, which has been established for the initial article, or by the original business, by reason of this identity is unfair competition, notwithstanding the competitor is merely using his own name to describe his product. The essence of the wrong is not the violation of any trade mark right in the name, itself, but the fraud in the effort to pass off for the genuine and original article that which is a mere substitute and a newcomer in the trade. Cases involving various acts of unfair competition have been frequently built up around the subject. The recent case of *Lapointe Machine Tool Co. v J. N. Lapointe Co.*¹ illustrates very clearly the position taken by courts of equity in cases involving the question of unfair competition. In this case the court was asked to enjoin the defendant from using the name "Lapointe" in any way, whether to describe the corporation or the broaching machine manufactured by it. Lapointe had organized the Lapointe Machine Tool Company to manufacture a certain broaching machine which he had invented. He was president of the corporation and also general manager, and continued in these positions until a few years before the suit for injunction, when, because of a disagreement with a member of

¹ 99 Atl. 348. (Maine. December 18, 1916.)

the corporation, who had gained control of it, he left it and organized the J. N. Lapointe Company. The latter company manufactured the same article as the former, except that it had been very materially improved by the inventive genius of Lapointe. The new company soon demonstrated a remarkable capacity to compete with the original company. In fact, the marvelous growth in the sale of its products and the consequent decrease in the business of the old company resulted in the institution of this suit. The court, after exhaustively considering all the acts of the defendant, refused to grant an injunction. In the course of its opinion the court observed that competition is of two kinds, fair and unfair, the latter being subdivided into ethically unfair and legally unfair. Courts have to do only with the last named.

That a person has the right to use his own name in his business, even though injury results to others, is well settled.² The use, however, must be honest, without fraud or artifice of any kind.³ This limitation is a natural and proper one, which the law prescribes, to prevent dishonest persons, who may chance to have the same name by which some well known product or established business is designated, from fraudulently misrepresenting their wares to the public. The reason for the restriction rests upon the law's desire to protect the public from fraud and the original trader from unfair methods of competition, and not upon anything in the nature of a trade mark right in the name itself.⁴ If one person has succeeded in business under a certain name this does not preclude another of the same name from embarking his fortunes upon that same kind of business under his own name, but he must see to it that he employs every reasonable means possible to differentiate his business or product from that already established in the confidence of the purchasing public so as to avoid confusion in the public mind as to the identity of the new and the old.⁵ It is a well recognized principle that every person has the right to use his own name honestly in his business, and any injury that may incidentally result to others, even though they be already established, is *damnum absque injuria*.⁶ It is only in the interest of fairness to the original trader and protection of the purchaser from fraud that equity will interpose and enjoin the use of the name. In the principal case the court

² *W. R. Lynn Shoe Co. v. Auburn Lynn Co.*, 100 Me. 461.

³ *Brown Chemical Co. v. Meyer*, 139 U. S. 540.

⁴ *Brown Chemical Co.*, *supra*.

⁵ *Royal Baking Powder Co. v. Royal, etc.*, 58 C. C. A. 499; *Walter Baker & Co. v. Baker*, 77 Fed. 181; *Chickering v. Chickering & Sons*, 120 Fed. 69.

⁶ *Hazelton Boiler Co. v. Hazelton Tripod Boiler Co.*, 142 Ill. 494; 30 N. E. 339.

was asked to enjoin Lapointe from using his own name which was already associated with the corporate name of a corporation of established reputation with which Lapointe was formerly connected. It was contended by complainant that Lapointe's former affiliations with it in addition to the use of the name "Lapointe" in the competing company's name and also its product amounted to acts of unfair competition. From the evidence, however, it seemed that Lapointe had by public advertising and in other ways attempted to inform the trade of the difference between his machine and that of his former associates. The court, however, was of opinion that, under the authorities, Lapointe had met the requirements of the law. It observed that the test of unfair competition was not merely the similarity of names, but whether the adoption of a similar name had enabled the new firm by mistake to obtain business of the old firm. Lapointe, as the court found, had exercised all necessary care to prevent confusion between the two companies, and therefore unfair competition, which in a legal sense is beguiling the purchaser into buying the new wares, believing them to be the old established article, had not been proved.

There can be no doubt of the correctness of the decision in the principal case. In *Croft v. Day*,⁷ it was said: "It has been very correctly said that no man has a right to sell his own goods as goods of another. You may express the principle in a different form and say that no man has a right to dress himself in colors or adopt and bear symbols to which he has no peculiar or exclusive right, and thereby personate another person, or that he is connected with and selling the manufacture of such other person, while he is really selling his own. It is perfectly manifest that to do these things is to commit a fraud." Of course, a person may lose the right to use his own name by transferring the right along with the stock, good will, etc., of the business.⁸ But the mere previous use of one's name in a company with which he was associated does not preclude him from using the name in a new business provided always such use does not produce confusion in the mind of the purchaser and lead to unfair and fraudulent practices.⁹ As to the right to use his own name as the whole or part of a corporate name the Supreme Court of the United States has said: "If every man has the right to use his name reasonably and honestly in every way, we cannot perceive any practical distinction between the use of the name in a firm and its

⁷ 7. Beav. 84.

⁸ *Le Page v. Russia Cement*, 51 Fed. 941.

⁹ *Fish Bros. Wagon Co. v. Fish*, 82 Wis. 546.

use in a corporation. It is dishonesty in the use that is condemned, whether in a partnership or corporate name, and not the name itself."¹⁰ This rule was followed in a later case,¹¹ and it was held where one assisted in the formation of a corporation in the name of which his own name was a part, this fact merely did not preclude such person from using his name in the corporate name of another company organized by him to compete with the first, provided he had not by contract transferred to the first company the exclusive right to his name for trade purposes. This was precisely the rule followed in the principal case, and is well supported and established as the true concept of the law in all instances where unfair competition is charged.

In following this rule some courts have gone to what seems to be the extreme, and have required the new competitor to specifically negative on the article manufactured any connection with the original article manufactured by the other trader.¹² Thus the New Jersey courts compelled one manufacturing a certain well known brand of silverware to place upon his product the words, "not the original Rogers," notwithstanding the fact that he was already stamping packages, wrappers and boxes in which the product was packed, "not connected with any other Rogers." But, as a rule, the court will not debar the new competitor from using the name in any manner he desires, provided he makes clear that his goods are not those of the original manufacturer, and unless he does this he will be denied the use of the name altogether.¹³

In the principal case the court felt that defendant, Lapointe, had endeavored to the best of his ability to fully acquaint the trading public that his machine was not that of the Lapointe Machine Tool Co., but one distinctly his own, with features not found in the original machine, and therefore it very properly held that Lapointe had the right to use his own name in his business, notwithstanding the damage which did undoubtedly result therefrom to the original company in the sale of its product. This case is one to which may be applied the familiar maxim, *damnum absque injuria*. The fact that damage may result from the use of a name cannot be made the foundation for an injunction, as the

¹⁰ *Howe Scale Co. v. Wychoff, Seaman & Benedict*, 198 U. S. 118.

¹¹ *Bates Mfg. Co. v. Bates Machine Co.*, 141 Fed. 213.

¹² *Gordon Hollow Blast Grate Co. v. Gordon*, 142 Mich. 488; *Int. Silver Co. v. Rogers*, 72 N. J. Eq. 933.

¹³ *D. E. Founts Co. v. Founts Stock Food Co.*, 163 Fed. 408; *Cash v. Cash*, 84 L. T. (N. S.) 349.

right to the writ does not depend upon damage merely, but also upon the dishonest and fraudulent use of the name.

F. B. C.

WILLS — CONSTRUCTION.—Few doctrines of the law of wills are better settled than the doctrine that the intention of the testator is to be sought from the language of the provisions of the will and that wherever possible this intention is to be given full effect. This rule is universally admitted by courts, lawyers, and laymen to be wise, salutary and eminently fair. Another doctrine of importance is that of the ademption of specific legacies; that is, the failure of such a legacy to take effect on account of the fact that at the time of the death of the testator the specific property bequeathed is no longer under his control and therefore nothing passes under this provision of the will.

In the recent case of *In re Brann (Appeal of Johnston)*¹ the court in the construction of a will applied the former doctrine and endeavored to ascertain from the provisions of the will the intention of the testatrix. By her will made in 1908, the testatrix created a trust to provide an annuity to her brother for life with the remainder to charities, the subject of which was 30 shares of the stock of the Standard Oil Company, which constituted the bulk of the estate. All of the residue of the estate was bequeathed to a friend.

In 1911 two significant events occurred: First, the brother for whom the trust was originally created, died; and second, the Standard Oil Company was ordered by the United States Supreme Court to dispose of its holdings in other corporations. The method of disposal not being specified in the decree of the court, the company distributed to its shareholders its holdings in other corporations. In addition to the 30 original shares owned by the testatrix, as the result of said distribution, she acquired stock of considerable value in the subsidiary companies. Subsequent to the events referred to the testatrix altered her will by the execution of a codicil, giving certain sums to various individuals and charities, and in all other respects specifically ratified and confirmed the provisions of the will.

The disposition to be made of the shares of stock in the subsidiary companies was the principal question in issue. The lower court held that no ademption of any part of the specific legacy of 30 shares had taken place; that this legacy constituted the whole body of shares then owned by the testatrix, and that the shares in subsidiary companies

¹ 114 N. E. 404. (New York. November 21, 1916.)

passed with the original shares and formed part of the trust fund. The appellate tribunal reversed the lower court as to the disposition of the stock, giving the subsidiary shares to the residuary legatee, but sustained it in the conclusion that no ademption had taken place; that the original 30 shares were still intact, and had and still formed the whole of the specific legacy. Although holding that there had been no ademption, the appellate court recognized that the subsidiary shares helped to give the primary shares their value, and, therefore, in deciding the case, applied a doctrine somewhat analogous to that of ademption. It declined to regard the subsidiary stock as part of the original stock, preferring to consider it as an extraordinary dividend, separate and distinct property from the original shares, which might as well have been paid in money.

Taking into consideration the fact that testatrix left no money or other property, except the subsidiary stock, out of which the money legacies provided for in the codicil could be paid, and as these shares were in her possession at the time she made the codicil, although no specific reference therein was made to them, the court were of the opinion that the testatrix must have intended that the subsidiary shares should be used to pay the money legacies, otherwise they would fail, and that the remaining shares should become part of the residuum of her estate and pass to the residuary legatee.

In the course of its opinion the court took occasion to criticise the argument of counsel that the testatrix would not intend the residuary clause to pass a considerable amount of property when the fund at the time of the original making of the will was but a small one, pointing out that the very purpose of a residuary clause is to take care of all of the estate existing at the time of death which is not otherwise specifically disposed of by the provisions of the will.

The leading English case of *Slater v. Slater*² presented a statement of facts very similar to that set forth in the particular case. There the will of the testator was made in 1904 and included bequests of stock in certain companies, among others, the "Lambeth Water Works." There was also a residuary clause. After this will was made and before the death of the testator the Lambeth Water Works, being forced by Act of Parliament to surrender its business to a municipal water company and take in compensation therefor either money or stock, elected to take stock in the Metropolitan Water Board, to which the business was surrendered. This stock was then distributed among the

² 1. Ch. Div. 665.

shareholders of the former company, the testator being credited with his share amounting in value to about 4,000 pounds, and this stock stood to his credit on the books of the Lambeth Water Works at the time of his death. The main question litigated was whether this stock passed to the person named in the specific bequest or whether it was included in the residuary fund.

The court considered this question from two points of view, reaching the same conclusion in each instance. It was first held that there was no stock in the Lambeth Water Works and that therefore nothing passed under the specific bequest. It was also held that there had been an ademption of the specific bequest, notwithstanding the change in the nature of the property was due to an Act of Parliament, the court stating that the old doctrine that ademption occurred only by intention of the testator was no longer law, and that ademption now took place in all cases except where the change was "in name and form only * * * yet substantially the same thing."³ In accordance with this opinion the stock passed not to the beneficiary of the specific bequest, but to the residuary legatee as a part of the residuum of the estate. Thus it will be noted that both the English and New York court, proceeding upon different theories,—the former basing its reasoning somewhat upon ademption, and the latter upon an analogy thereof, laying particular stress upon the probable intention of the testatrix,—arrived at the same conclusion, namely, that the subsidiary shares of stock should not follow the original shares, but should become a part of the residuum of the estate and pass to the residuary legatee. It may be stated, however, that in this country, as in England, ademption may take place without any intention of the testator to this effect.⁴

To indicate what change will not constitute an ademption reference may be made to the case of *Mellam v. McFie*,⁵ in which a testator made a specific bequest of "twenty-three of the shares belonging to me in" a certain company. At the date of making the will he owned 104 original 80-pound shares. Subsequently the company was reorganized, its name changed, and the shares mentioned exchanged for 416 20-pound shares. The same business, that of banking, was carried on by the new company. It was held that these were changes in name and form only, and ninety-two of these new shares passed under the specific bequest mentioned. It is, of course, clear that this statement of facts differs materially from that in either the *Slater case* or the princi-

³ See *Oakes v. Oakes*, 9 Hare 666.

⁴ *Wycoff v. Perrine*, 37 N. J. Eq. 118; *Abetrano v. Downs*, 70 N. Y. Suppl. 833.

⁵ 1 Ch. Div. 29.

pal case. Here, the new shares were substituted in whole for the old shares, there was a fixed number of shares which could be neither decreased nor increased, and the company did not close its business, but merely changed the management. In the *Slater case*, the company in which the testator owned shares was forced by Act of Parliament to surrender its business to an entirely different company, while in the principal case, the holding company, in which testatrix owned 30 original shares, disposed of its stock in subsidiary companies by way of a distribution in the nature of a stock dividend.

In the principal case, in support of the view taken by it, that the subsidiary shares were in the nature of an extraordinary dividend, the court referred to the case of *Equitable L. A. Society v. U. P. R. R. Co.*⁶ In that case it was held that when a corporation retired its bonds by the issue of one share of stock at par for \$175 par value of bonds, the \$100 par value became part of the capital of the corporation which must be preserved against liabilities, but that the additional \$75 received was not capital and could be distributed as extraordinary dividends to holders of the common stock; further, that the holders of preferred stock, who were guaranteed a fixed rate of interest in lieu of sharing in the profits, had no right to any part of such surplus.

Finally, as to the suggestion of counsel in the principal case respecting the considerable amount of property to pass under the residuary clause of the will. The size of a residuary devise or bequest was especially considered in the case of *Jewett v. Jewett*,⁷ decided in 1900. There it was held that although the whole estate could not be disposed of in a residuary devise, since the words clearly mean a part remaining after some other part is disposed of, nevertheless there was no reason why the residuary devise should not comprise very nearly the whole estate.

F. S. H.

⁶ 212 N. Y. 360.

⁷ 21 Ohio C. Ct. Rep. 278.

RECENT CASES.**ATTORNEY AND CLIENT — GRATUITOUS SERVICES — COURTESY OF PROFESSION.**

Defendant, an attorney who had withdrawn from active practice, sought the services of plaintiffs in certain litigation in which he was involved. After successfully representing defendant, plaintiffs sought to recover on an implied contract the reasonable value of their services. Defendant admitted the allegations of their petition, but, relying upon a custom of the local bar for attorneys, representing each other in matters of litigation, to charge no fees, denied that plaintiffs had any reason to expect compensation. *Held*, that plaintiffs were entitled to compensation. *Thigpen and Harold v. Slattery*, 73 Southern 780. (Louisiana. January, 1917.)

The rule of courtesy among the members of the bar agreeably to which each will render services to the other without expectation of reward other than such as may come by way of similar service is not to be strained to meet the demand of one who, having practically withdrawn from the profession and thereby disabled himself from reciprocating in kind, demands the courtesy as an aid to the accumulation of wealth in another pursuit.

J. H. V.

BANKRUPTCY — PREFERENCES — AGREEMENTS BEFORE AND AFTER COMPOSITION.

In consideration of plaintiff's indorsing his note in order that he might obtain sufficient cash to effect a settlement with his other creditors, defendant, a bankrupt, promised to pay plaintiff's claim in full. The composition was arranged and defendant discharged. After the composition, defendant renewed his promise to plaintiff, but subsequently refused to pay the latter's claim in full. Plaintiff brought suit for the difference between the amount received on the composition and the full amount of his claim. *Held*, that the bankrupt's promise prior to the composition agreement was fraudulent and void, and that the repetition of the promise after the composition amounted to a re-assurance of payment based on the same consideration as the first promise and was, therefore, also void. *Lieblein v. George*, 160 N. W. 538. (Michigan. December 21, 1916.)

E. J. H.

DEATH — ACTION — BENEFICIARIES — ALIENS — AMBASSADORS AND
CONSULS — POWER TO COMPROMISE.

Plaintiff's intestate, an alien, was killed by the negligent act of the defendant while crossing, upon a highway, the tracks of defendant. Decedent was a subject of Russia, in which country his family, consisting of a wife and several children, resided at the time of his death. A statute in the particular jurisdiction where this action arose allowed damages, not for an injury to decedent's estate, but for an injury through the loss of him, to the estate of the beneficiaries, who, in this case, under the statute, were the wife and children. Under certain treaties existing between this and other countries, the Imperial Russian Consul General had authority to appear in all proceedings relating to the settlement of the estate of deceased subjects of Russia until the heirs or legal representatives of such deceased subject themselves appeared. Assuming authority under the treaty with Russia to compromise the claim against defendant, the Russian Consul General accepted a sum in full settlement of all claims and demands against defendant for the death of decedent. *Held*, that the beneficiaries' claim for damages, under the statute creating the right of action for death from negligence, was theirs not by devolution or succession and as a part of the estate of the intestate, but through original and primary ownership, and that the Russian Counsel General did not have the right without judicial proceedings to release defendant from damages arising from the death of decedent. *Hamilton v. Erie R. Co.*, 114 N. E. 399. (New York. November 28, 1916.)

R. M. H.

INSANE PERSONS — CONTRACT WITH GUARDIAN FOR ATTORNEY'S
SERVICES — LIABILITY OF ESTATE.

Plaintiff, an attorney at law, at the instance of the guardian of both the person and estate of an insane person, succeeded, two weeks before the latter's death, in effecting his release from an asylum for the criminally insane. No agreement had been entered into as to plaintiff's compensation. He refused as inadequate a sum offered him by the guardian, and brought suit against decedent's estate for a larger sum as compensation for his services. *Held*, that, assuming that there was a contract with the guardian for attorney's services in procuring the release of decedent from the asylum, as such contract was not made under authority of the probate court, it was not enforceable against

the estate of decedent. *Nelson v. Sackett's Estate*, 160 N. W. 539. (Michigan. December 22, 1916.)

E. J. H.

INSURRECTION — INTOXICATING LIQUORS — AMENABILITY OF MILITARY OFFICER TO CIVIL SUIT FOR OFFICIAL ACT.

Defendant, a major in command of a detachment of organized militia, was ordered to a State, declared by its governor to be in a state of insurrection, to restore order and civil authority. In the furtherance of his task, defendant issued an order closing all saloons and other places which sold intoxicating liquors, later modifying the order so as to permit the sale of such liquors during specified hours. Plaintiff, the owner of a saloon, disregarding defendant's order, sold intoxicants during the prohibited hours, and thereafter defendant ordered certain of the men under his command to take and destroy plaintiff's stock. Plaintiff instituted suit to recover damages for the loss sustained as the result of said order. *Held*, that, conceding the order prohibiting the sale of intoxicating liquors to be valid, the circumstances of the particular case created no justification for the destructive acts complained of, neither as a penalty for violation of the order, nor on the ground of military necessity, no state of war existing. *Herlihy v. Donohue*, 161 Pac. 164. (Montana. Decided November 10, 1916.)

In this case the subordinate officers who destroyed plaintiff's stock in accordance with defendant's order were joined with the latter as defendants, but the court very properly held that inferior officers, by reason of the necessity of prompt obedience to commands of the superior officers by the military, should not be liable for executing an order valid on its face, and should only be liable for executing an order manifestly illegal or beyond the authority of the superior officer issuing it.

G. E. E.

LIBEL AND SLANDER — BUSINESS LETTERS — PUBLICATION — SUFFICIENCY — PRIVILEGE.

Appellees brought suit against appellant, a corporation, for libel, alleging that the contents of certain letters written to appellees by appellant were libelous, and that the dictation of the letters by an officer of the corporation to a stenographer was a sufficient publication to render it liable. *Held*, that the letters written by the corporation to appellees, concerning a business transaction existing between them, were privi-

leged, and that, as a corporation can act only through its agents and as the acts of both the officer and the stenographer to whom the letters were dictated, were the acts of the corporation, there was not, in a legal sense a publication of the letters. *Cartwright-Caps Co. v. Fishel & Kaufman*, 74 Southern 278. (Mississippi. March 5, 1917.)

Where an officer of a corporation, in connection with its business, dictates a libelous letter to a stenographer in the corporation's employment, both being engaged in the performance of duties which their respective employments require, the stenographer is not to be regarded as a third person in the sense that either the dictation or a subsequent reading can be regarded as a publication by the corporation,—the dictation, copying and mailing of the letter constituting but a single act,—the acts of both servants being necessary to make the letter complete. *Edmondson v. Birch*, 1 B. R. C. 444, 1 K. B. 371; *Owen v. J. S. Ogilvie Pub. Co.*, 53 N. Y. Supl. 1033.

MOTOR VEHICLES—LICENSE—INTERSTATE COMMERCE.

Defendant, a resident of New York, was arrested while driving his automobile on the public highways of New Jersey. He was tried, found guilty and fined under a New Jersey statute providing that no person, resident or non-resident, shall operate an automobile upon a public highway in that State unless he shall have been licensed so to do, and his automobile shall have been registered under the statute, and also that a non-resident owner shall appoint the Secretary of State of New Jersey his attorney upon whom process may be served in any legal proceeding against the owner caused by the operation of his machine within the State. *Held*, that the movement of motor vehicles over highways, being dangerous to the public and destructive to the highways themselves, is a proper subject of police regulation by the State, that such a power of regulation extends to non-residents as well as residents, and includes the right to exact reasonable compensation for special facilities afforded. *Kane v. New Jersey*, 242 U. S. 160. (New Jersey. December 4, 1916.)

The defendant contended that the statute in question was invalid as against a non-resident, because it violated the Constitution and laws of the United States regulating interstate commerce, and, in requiring the appointment of the Secretary of State by a non-resident to accept service of process, was discriminatory under the Fourteenth Amendment, denying to a non-resident owner the equal protection of the laws. The

Supreme Court held that it was not unreasonable for the State to attempt to secure observance of its law by establishing, by legal proceedings within the state, the liability of non-resident automobile owners, and that rather than discriminating against and denying to non-resident owners equal protection of the law, it puts them upon an equality with resident owners.

W. B.

NUISANCE — PRIVATE NUISANCE — INJUNCTION.

Plaintiff sought to enjoin defendant from maintaining a nuisance consisting of pig pens immediately adjacent to plaintiff's premises. Plaintiff purchased his property from defendant, who, at the time, was engaged in raising pigs, for a summer residence. At the trial it was found that the pens were kept in as clean and sanitary condition as could be expected, that there were no odors except those necessarily incident to pig pens, and that the effect of such odors was not such as to materially interfere with the enjoyment of plaintiff's premises. *Held*, plaintiff not entitled to have defendant enjoined from raising pigs. *Clark v. Wambold*, 160 N. W. 1039. (Wisconsin, January 16, 1917.)

L. H. V.

RAILROADS — AGENT — BILL OF LADING — WAIVER.

Plaintiff brought an action against two railroad companies for damages alleged to have been sustained by reason of the negligence of defendants in unreasonably delaying the transportation of cattle from Illinois to Kentucky. The bill of lading covering the shipment provided that no claim for damages should be allowed unless such claim were filed with the general freight agent of the initial carrier within a specified time after receipt of the shipment, or with some officer or agent of any connecting carrier if the alleged damage occurred on the road of such carrier. It was shown that the connecting carrier delivered the cattle to plaintiff; that before the time allowed for filing claims had expired plaintiff appeared at the office of the connecting carrier and complained of his losses; that the agent of the company inspected the cattle and waived the provision of the contract of carriage calling for the filing of claims within the specified time, advising plaintiff to communicate to him by letter the amount of damage claimed, and that, without any requirement as to time, such letter would constitute a sufficient claim. In view of this plaintiff did not file a formal claim until

after the time specified had expired. The defendant initial carrier filed a petition for rehearing, contending that the action of the connecting carrier's agent could not be considered a waiver, as the form of the bill of lading was drawn up under the provisions of a federal statute and that the terms of the contract of carriage must be construed to be as inflexible as the provisions of a statute; that, in the absence of any mention of a waiver in the bill of lading, no valid waiver could be made, and that even if such waiver could be made, it would not be binding upon the initial carrier. *Held*, that the terms of the bill of lading could not be placed on the same plane as those of a statute; that to lay down the rule that a party for whose benefit a certain provision in a contract was inserted would not be free to waive compliance with that provision would be unreasonable, and would result, in its application, in much hardship to the other party. *B. & O. R. R. Co. v. Leach*, 191 S. W. 310. (Kentucky. January 26, 1917.)

The court further held that the agent of the connecting carrier, being the agent of the initial carrier for purposes of delivery, was the agent of both carriers, having authority to waive notice of injury in accordance with the stipulations of the contract as to the time within which the claim for damages should be made.

W. B.

SALES — EXPRESS AND IMPLIED WARRANTIES — BREACHES.

Plaintiff purchased seed corn from defendant on the strength of representations in the latter's catalogue to the effect that all seeds were thoroughly tested, that purchasers should be allowed ten days in which to test the seeds, and if not satisfactory, the price would be refunded. The catalogue further declared that the seed corn sold was guaranteed, and that all kernels germinated quickly. Plaintiff did not test the seed before planting, the crop was a failure, and he sued defendant to recover damages sustained on the theory that, the corn having been sold for seed, there was an implied warranty that it was suitable for the purpose for which it was sold. *Held*, that the defendant, by expressly warranting the corn to test satisfactorily, limited his warranty to the results of a test, and by agreeing to refund the purchase money in case a test did not show satisfactory results, limited his liability to the amount of the purchase money. *Slinger v. Totten*, 160 N. W. 1008. (South Dakota. January 20, 1917.)

Plaintiff was precluded from insisting on an implied warranty under

the well settled rule that an implied warranty arises only when there is no express warranty, and that an express warranty always excludes an implied warranty.

L. H. V.

BOOK REVIEWS.

HANDBOOK ON LAW OF PERSONS AND DOMESTIC RELATIONS. *By Walter C. Tiffany. Second edition by Roger W. Cooley, West Publishing Company, 1909.*

ILLUSTRATIVE CASES ON PERSONS AND DOMESTIC RELATIONS. *By Roger W. Cooley, Professor of Law, University North Dakota. West Publishing Company, 1913.*

Professor Tiffany's treatment of the subject of Domestic Relations was so well received as to require a second edition. The well-known plan of the Hornbook Series of prefacing each subdivision of the subject with a concise statement of the law in large type, followed and illustrated by a fuller treatment of each subdivision is adhered to.

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The author divides the subject into five parts: Husband and Wife; Parent and Child; Guardian and Ward; Infants, Persons Non-Compos Mentis and Aliens and Master and Servant. He concisely, yet exhaustively, treats each with numerous and well selected cases to illustrate and support the doctrine of the text. Particular attention is paid in the second edition to the treatment of the law with reference to separate property of married women and the extraterritorial effect of divorce.

The work is a distinct contribution to the law of Domestic Relations, valuable not only to the student, but, because of the numerous and well selected references, to the general practitioner as well.

The volume of selected cases on the subject by Professor Cooley, issued by the publishers to accompany the Handbook, renders the treatment of the subject helpful to the student as well as the instructor, whether his method of study or instruction be the lecture or the case book system.

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